STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

PUBLIC UTILITIES COMMISSION
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SAN FRANCISCO, CA 94102-3298

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TO PARTIES OF RECORD IN RULEMAKING 12-12-011:

This is the proposed decision of Commissioner Shiroma. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's May 5, 2022 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ ANNE E. SIMON
Anne E. Simon
Chief Administrative Law Judge

AES:jnf
Attachment

COM/GSH/jnf **PROPOSED DECISION** **Agenda ID #20515**
Quasi-Legislative

Decision **PROPOSED DECISION OF COMMISSIONER SHIROMA**
(Mailed 4/1/2022)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services.	Rulemaking 12-12-011

DECISION DENYING APPEAL OF LYFT, INC. RE: RULING DENYING, IN PART, MOTIONS BY UBER TECHNOLOGIES, INC. AND LYFT INC. FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION IN THEIR 2020 ANNUAL REPORTS

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Summary

This decision denies the *Appeal* of Lyft, Inc. (Lyft) which seeks to overturn the assigned Administrative Law Judge's *Ruling on Uber Technologies, Inc.'s and Lyft's Motion for Confidential Treatment of Certain Information in Their 2020 Annual Reports* (*Ruling*). We deny Lyft's *Appeal* on the grounds that Lyft has failed to demonstrate, by a preponderance of the evidence, that the trip data at issue that Lyft wants to redact from the public version of its 2020 Annual Report is protected from disclosure on either trade secret or privacy grounds. After reviewing the evidentiary record, the Commission concludes that the *Ruling* is supported by substantial evidence.

This proceeding remains open.

1. Background

In this decision, the California Public Utilities Commission (Commission) must address what trip data information a Transportation Network Company (TNC) may redact from the public version of its Annual Reports. While this issue is being addressed in the context of Lyft's *Appeal*, many TNCs have raised the same arguments in their respective *Motions for Confidential Treatment*.[1] Thus, the Commission intends that the determinations made in this decision will be an instructive guide for other TNCs going forward and will obviate the need for the Commission, the assigned Commissioner, and the assigned Administrative Law

[1] For example, on July 1, 2021, Uber Technologies, Inc., Lyft, Inc., and HopSkipDrive, Inc. filed separate *Motions for Confidential Treatment of Portions of 2021 Annual TNC Reports*. After receiving an extension of time, on July 16, 2021, Nomad Transit, LLC filed a similar motion.

Judge (ALJ) to continually evaluate the same claims for confidential treatment based on the same predicate facts and arguments.

1.1. Factual Background

Decision (D.) 13-09-045[2] authorized the operation in California of a new category of transportation charter party carriers called Transportation Network Companies (TNC). As a condition to be permitted to operate, D.13-09-045 set forth various requirements that TNC must comply with, one of which was the obligation to submit verified Annual TNC Reports to the Commission that include information (later collectively referred to in this decision as trip data or geolocational data) about each trip provided by a TNC driver for the 11 months prior to Annual TNC Report's due date. The Commission will discuss in greater detail, *infra*, in Section 4.1 of this decision, the degree of control the Commission exercised in dictating how the TNCs were to comply with this reporting requirement since it bears directly on Lyft, Inc.'s (Lyft) claim that trip data is exempted from public disclosure by trade secret protection.

Prior to 2020, the Commission decided in D. 13-09-045, via footnote 42,[3] that a TNC's Annual Report could be submitted confidentially to Commission staff. Seven years later, the Commission revisited that earlier confidentiality determination in D.20-03-014[4] and found that, prospectively, Annual Reports were no longer entitled to a presumption of confidentiality. Instead, D.20-03-014 mandated that any claim for confidential treatment of information required to be included in a TNC's Annual Report must be filed 90 days before the deadline for

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[2] *Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry*.

[3] "For the requested reporting requirements, TNCs shall file these reports confidentially unless in Phase II of this decision we require public reporting from TCP companies as well."

[4] Decision *on* Data *Confidentiality Issues Track 3*.

submitted the Annual Report to Commission staff, and be justified with particularized references to the type of information sought to be shielded from public disclosure, the law that supports the claim of confidentiality, and a declaration under penalty of perjury that sets forth the factual justification with the requisite granularity.[5]

1.2. Procedural Background

In accordance with D. 20-03-014, on June 22, 2020, Uber Technologies, Inc. (Uber) and Lyft filed their respective motions for confidential treatment of certain information in their 2020 Annual Reports (*Motion* or *Motions*).[6] While Lyft acknowledged the Commission's duty to promote transparency in its regulation of entities subject to the Commission's jurisdiction, it asserted that there were laws in place designed to protect the granular detailed information required in the Annual Report from public disclosure.[7] Lyft proceeded to identify the following categories of information that it claimed was protected from public disclosure on either privacy, trade secret, or other grounds:

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[5] D.20-03-014, Ordering Paragraph 2. In its *Appeal*, Lyft refers to this approach as a "novel and unprecedented procedure that applies only to TNCs." (*Appeal*, at 1.) To the extent that Lyft is implying that the process the Commission adopted is somehow legally unsound, the Commission rejects Lyft's insinuation. The Commission has adopted rules regarding confidential treatment in other situations (*See*, *e.g.*, Decision 16-08-024 [*Decision Updating Commission Processes Relating to Potentially Confidential Documents*]) so what was done in D.20-03-014 is consistent with how the Commission has resolved confidentiality issues in other proceedings. The law is clear that when the Commission acts within the scope of its constitutionally granted authority, the Commission's decisions and promulgated regulations must be treated with great deference by a reviewing court. (*See Pacific Gas & Electric Co. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 839 ["The PUC's interpretation of its own regulations and decisions is entitled to consideration and respect by the courts."].)

[6] Lyft's *Motion* is entitled *Motion for Confidential Treatment of Certain Information in its 2020 Annual Report*. Uber's *Motion* is entitled *Motion for Leave to File Confidential Information under Seal*. Since only Lyft filed an appeal, this decision focuses only on the arguments and evidentiary support that Lyft raised.

[7] Lyft's *Motion*, at 3-10.

- Driver names and identifications (privacy protected pursuant to Govt. Code § 6254(c) and 6254(k), and trade secret protected pursuant to Govt. Code § 6254(k) and Evidence Code § 1060).
- Accessibility reports (trade secret protected pursuant to Civil Code § 3246.1 and therefore protected from disclosure by Govt. Code § 6254(k) and Evidence Code § 1060).
- Reports of TNC investigations (investigatory or security files compiled for licensing purposes making them exempt pursuant to Govt. Code § 6254(f); privacy protected pursuant to Govt. Code § 6254(c); trade secret information protected from disclosure by Govt. Code § 6254(k) and Evidence Code § 1060; official information protected by Govt. Code § 6254(k) and Evidence Code § 1040(b)(2); and protected by the public interest balancing test pursuant to Govt. Code §6255(a).)
- Number of hours, number of miles, and driver training (privacy protected by Govt. Code § 6254(c) and the Right of Privacy in the California Constitution; trade secret information protected from disclosure by Govt. Code § 6254(k) and Evidence Code § 1060; protected by the public interest balancing test pursuant to Govt. Code §6255(a); and protected from disclosure as official information pursuant to Govt. Code § 6254(k) and Evidence Code § 1040(b)(2).)
- TNC data regarding trips during the reporting period (privacy protected by Govt. Code § 6254(c) and the Right of Privacy in the California Constitution); trade secret information protected from disclosure by Govt. Code § 6254(k) and Evidence Code § 1060; protected by the public interest balancing test pursuant to Govt. Code §6255(a); and protected from disclosure as official information pursuant to Govt. Code § 6254(k) and Evidence Code § 1040(b)(2).)

Along with its *Motion*, Lyft included the Declaration of Brett Collins, Lyft's Director of Regulatory Compliance, to provide factual support for its arguments.

On July 2, 2020, The San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, San Francisco City Attorney's Office, and the San Francisco International Airport filed a *Response* opposing the request for confidential treatment.

On July 17, 2020, Lyft filed its *Reply*.

1.3. The Administrative Law Judge's (ALJ) Ruling

On December 21, 2020, the assigned ALJ issued his *Ruling on Uber Technologies, Inc.'s and Lyft's Motion. for Confidential Treatment of Certain Information in Their 2020 Annual Reports* (*Ruling*) in which he made the following determinations that fell into two broad categories: data confidentiality/privacy, and trade secret protection.

First, the *Ruling* agreed that driver names and identifications were private and could be redacted from the public version of Lyft's 2020 Annual Report. Since making this finding, the *Ruling* stated that it was not necessary to also address the trade secret claim as it related to driver names and identifications.

Second, the *Ruling* rejected the claims that Accessibility Reports should be treated as confidential, and that the public dissemination of this information would place Lyft at a competitive disadvantage.[8] The *Ruling* reviewed the arguments and found that Lyft raised similar arguments that the Commission previously rejected on November 5, 2020, in *Resolution* ALJ-388-*Resolution Denying the Appeals by Uber Technologies, Inc. and Lyft, Inc. of the Consumer Protection and Enforcement Division's Confidentiality Determination in Advice*

[8] Lyft's *Motion*, at 14-16.

Letters 1, 2, and 3. The *Resolution* found that Lyft failed to meet the burden of demonstrating that information regarding wheelchair accessibility was either trade secret or protected from disclosure on any confidentiality grounds.[9] The *Ruling* incorporated by reference the conclusions and determination made in the *Resolution* and applied them herein to reject Lyft's claims that the wheelchair accessibility information required by the 2020 Annual Report should be redacted from the public version.

Third, the *Ruling* granted, in part, the privacy claims regarding reports of TNC investigations (*i.e.*, accidents and incidents, assaults and harassments, accessibility complaints, law enforcement citations, off-platform solicitation, suspended drivers, and zero tolerance). (1) The *Ruling* agreed that the amounts paid by any party involved in an accident and any amount paid by the driver's or the TNC's insurance could be treated as confidential. The *Ruling* agreed with Lyft's assessment that incidents might be resolved by entering into a settlement agreement without admitting liability, and the sums paid might be confidential to facilitate a resolution that avoids the cost of litigation. Also, if the details regarding the resolution of a complaint were part of a confidential settlement agreement, the *Ruling* determined they could also be treated as confidential. (2) The *Ruling* also agreed that certain trip or geolocational TNC report investigation information (latitude and longitude information) regarding assaults and harassment, as well as the descriptions of alleged sexual assaults or sexual harassment, should be treated as confidential.[10] (3) The *Ruling* rejected the

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[9] *Resolution*, Conclusions of Law ¶¶ 3-6, Ordering Paragraphs 1 and 2. The Commission takes Official Notice of this *Resolution* pursuant to Rule 13.10 of the Commission's Rules of Practice and Procedure.

[10] Uber's *Motion,* at 12-13. Lyft's *Motion*, at 16-23.

request that the balance of the geo-locational TNC report investigation information should be treated as confidential because Lyft failed to establish that the public dissemination of this information would constitute an unwarranted invasion of personal privacy. (4) The *Ruling* also rejected Lyft's argument that the outcome of the investigation of a TNC incident was automatically confidential. The *Ruling* noted, for example, that a finding of criminal or civil liability in court is a matter of public record, and the court pleadings filed in a particular proceeding would include the date and time of the incident, the type of incident, parties involved in the incident, details regarding the resolution (assuming it was not resolved confidentially), and who was cited or ticketed. There was no credible justification for treating this information as confidential, save for the limited instance in which the court ordered the record sealed.
(5) With respect to problems with drivers, the *Ruling* rejected Lyft's argument that reports of problems with drivers should be treated as confidential and protected from disclosure pursuant to Government Code §§ 6254(c) (similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy) and 6254(f) (investigatory or security files com plied by the Commission for licensing purposes).[11] The *Ruling* determined that the information responsive to this category could be provided without providing the driver's unique identification or vehicle identification number. The remaining geo-locational information could also be provided without infringing on any privacy concerns because the information did not ask for the identity of a specific driver by name. Thus, the *Ruling* concluded that the privacy concerns contemplated by Government Code §§ 6254(c) and (f) were not implicated.

[11] Lyft's *Motion*, at 19-20, and Declaration of Brett Collins (Collins Decl.), at 16.

Fourth, the *Ruling* rejected Lyft's request to treat driver user data (*i.e.*, the days a particular driver has used the App, the day, month and year a driver's hours were reported on trips referred through the App, the number of house a driver logged onto the App for the day in using the App, mean and median hours and miles a driver logged on trips referred through the App, total hours and miles a driver logged on or drove for the month using the App, and total miles driver on trips referred through the App) as confidential because the supporting declaration contained no credible facts to support the contention that the driver user data could be used, individually or in combination with other data, to re-identify a rider or driver.

Fifth, with respect to TNC trip or geo-locational data (*i.e.* Unique Driver ID, Vehicle Identification Number, Vehicle Make, Vehicle Model, Vehicle Year, Latitude of Passenger Drop Off, Longitude of Passenger Drop Off, Zip Code of Passenger Drop Off, Census Block of Passenger Drop Off, Trip Requester Latitude, Trip Requester Longitude, Trip Requester Zip Code, Trip Requester Census Block, Driver Latitude, Driver Longitude, Driver Zip Code, Driver Census Block, Trip Request Date/Time (to the second), Miles Traveled (P1), Request Accepted Date/Time (to the second), Request Accepted Latitude, Request Accepted Longitude, Request Accepted Zip Code, Request Accepted Census Block, Passenger Pick Date/Time (to the second), Miles Traveled (P2), Passenger Pick Up Latitude, Passenger Pick Up Longitude, Passenger Pick Up Zip Code, Passenger Pick Up Census Block, Passenger Drop Off Date/Time (to the second), Passenger Drop Off Latitude, Passenger Drop Off Longitude, Passenger Drop Off Zip Code, Passenger Drop Off Census Block, Miles Traveled (P3), and Total Amount Paid), the *Ruling* agreed that latitude and longitude information of both the driver and rider of a particular TNC trip should be kept

confidential on privacy grounds since that information might be engineered to identify the exact starting and ending addresses of a trip, which could then be combined with other information to identify a driver and/or passenger. The *Ruling* also agreed that driver information (*i.e.,* Unique Driver ID, Vehicle Identification Number, Vehicle Make, Vehicle Model, and Vehicle Year) could be withheld on privacy grounds. But with respect to the balance of the trip data at issue, the *Ruling* rejected the privacy claims because Lyft failed to make the necessary granular showing how this data, either individually or in combination, could lead to the discovery of the identification of a particular driver or customer.

The *Ruling* also addressed the claim that trip data was trade secret protected from public disclosure. After setting forth the definition of what constitutes a trade secret, the *Ruling* found that Uber and Lyft had failed to establish that trip data was entitled to trade secret protection. The *Ruling* reasoned that the trip data provided generalized location, driving, and time information that was neither novel nor unique, and could already be ascertained with computer modeling. The *Ruling* also found that making trip data public would not compromise the competitive advantages each company tries to maintain since the Annual Reports did not require the TNCs to disclose new products and features for riders and drivers, or their internal business strategies. Each competitive TNC must perform its own analysis and develop its own strategies to market its business to the riding public, something that would not be aided by the disclosure of trip data.

In contrast to Lyft's failure to demonstrate that the disclosure of trip data would disclose trade secrets, the *Ruling* found that there was a legitimate public interest in making trip data public. For example, the *Ruling* explained that

municipalities and their transportation regulatory agencies have an interest in learning when riders are in operation and when trips are accepted or rejected. Public entities have an interest in knowing how many drivers are in operation on their roads for transportation planning purposes and would also want to know the number of times and when rides are accepted or rejected to determine if the TNC ride service was being provided to all neighborhoods in a nondiscriminatory manner. The *Ruling* concluded that application of the public interest balancing test weighed in favor of requiring the public disclosure of trip data.

Finally, attached Exhibits A and B to the *Ruling* explained, on a category-by-category basis, what information categories could, and could not, be redacted from the public versions of Uber and Lyft's 2020 Annual Reports.

1.4. Lyft's Appeal

On May 28, 2021, Lyft filed its *Appeal* of the *Ruling* and challenged the *Rulings* findings insofar as the *Ruling* rejected Lyft's claims of trade secret protection and privacy of Lyft's trip data. By filing the *Appeal,* Lyft has sought what it characterizes as interlocutory review of the *Ruling* pursuant to the right the Commission recognized in D.16-10-043 for the review of interim ALJ evidentiary rulings that potentially implicate privacy or constitutional rights.[12]

2. California Policy Favors the Disclosure of Information in the Government's Possession

D.20-03-014's strict evidentiary showing for a TNC to substantiate a claim of confidentiality is derived from and reflects California's strong public policy

[12] While interlocutory review is not provided for expressly by the Commission's Rules, Rule 13.6 states that where "in extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the assigned Commissioner or ALJ may refer evidentiary rulings to the Commission for determination." This language has been interpreted as providing for interlocutory appeals.

favoring access to government records. Cal. Const. Article I, § 3(b)(1) provides that the public has the right to access most Commission records:

> The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.[13]

The California Public Records Act (CPRA) was modeled after the federal Freedom of Information Act[14] and the statutes share this common purpose—"to increase freedom of information by providing public access to information in the possession of public agencies." (*National Conference of Black Mayors v. Chico Comm. Publ'g, Inc.* (2018) 25 Cal.App.5th 570, 578.) The need for freedom of information requires that public agency records be open to public inspection unless they are exempt from disclosure under the provisions of the CPRA.[15] The Legislature has declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (*National Lawyers Guild v. City of Hayward* (2020) 5 Cal.5th 488, 492.)[16] When interpreting and applying the CPRA, the California Supreme Court in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617, found that: a statute shall be *broadly* construed if it furthers the people's right of access, and *narrowly* construed if it limits the right of access. (Cal. Const., art. I, § 3, subd. (b)(2)[.])"

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[13] *See e.g., International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329.

[14] *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425.

[15] *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370. ("The Public Records Act, section 6250 *et seq.*, was enacted in 1968 and provides that "every person has a right to inspect any public record, except as hereafter provided." (§ 6253, subd. (a).)

[16] *See* also Government Code § 6250.

The CPRA requires the Commission to adopt written guidelines for access to agency records, and requires that such regulations and guidelines be consistent with the CPRA and reflect the intention of the Legislature to make agency records accessible to the public.[17] General Order (GO) 66-D, effective January 1, 2018, constitutes the Commission's current guidelines for access to its records, and reflects the intention to make Commission records more accessible.[18] GO 66-D also sets forth the requirements that a person must comply with in requesting confidential treatment of information submitted to the Commission. D.20-03-014 made clear that a TNC person submitting information to the Commission must satisfy the requirements of GO 66-D to substantiate a claim for confidentiality treatment of the information.[19]

Placing the burden on the TNC to substantiate its claim of confidentiality is also consistent with the general rule for allocating the burden of proof. Pursuant to Evidence Code § 500, "except as otherwise provided by law, a party has the burden of proof as to each fact essential to its claim or defense." (*See also Aguilar v. Atlantic Richfield Co* (2001) 25 Cal.4th 826, 861; *Samuels v. Mix* (1999) 22 Cal.4th 1, 10-11; and *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1393 [party claiming privilege has burden of proving that information qualifies as a protected trade secret].) The Commission has followed that same allocation as to persons claiming confidentiality of information

[17] Government Code § 6253.4(b).

[18] *See* D.17-09-023 at 11-12, 14.

[19] D.20-03-014 at 23.

submitted informally[20] and in formal proceedings,[21] as well as to any person instituting a proceeding at the Commission.[22]

Lyft's burden of proof is not lessened by its reliance on language from the California Constitution regarding the right of privacy. While Lyft acknowledges that Article I, Section 3, of the California Constitution directs that "the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny," Lyft then goes to quote later language in that same Section which provides the right to public access does not supersede or modify the right of privacy guaranteed by our Constitution.[23] Lyft is, in effect, relying on the balancing test where a government agency must reconcile the right to open access to government records and the constitutional right of privacy.

Lyft has improperly invoked the balancing test because it has failed to establish, and the Commission finds that Lyft cannot establish, that any of the trip data at issue enjoys a constitutional right of privacy. For the reasons set forth, *infra*, the Commission agrees with the *Ruling* that Lyft failed to carry its

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[20] GO 66-D, 3.2 sets the showing in informal proceedings: "An information submitter bears the burden of proving the reasons why the Commission shall withhold any information, or any portion thereof, from the public."

[21] GO 66-D, 3.3 sets the showing in formal proceedings: "To obtain confidential treatment of information to be filed in the docket of a formal proceeding, the information submitter must file a motion pursuant to Rule 11.4 of the Commission's Rules, or comply with a process established by the Administrative Law Judge for that specific proceeding."

[22] *See*, *e.g.*, Decision 19-09-017, at 20, for applications ("As the Applicant, Cal-Am must meet the burden of proving that it is entitled to the relief it is seeking in this proceeding. Cal-Am has the burden of affirmatively establishing the reasonableness of its projections of supply and demand.") For complaint cases, *see Complaint of Service-All-Tech, Inc. v. PT&T Co*. (Cal. PUC, 1977) 83 CPUC 135, Decision No. 88223 (complaint relating to the disconnection of telephone service where the court found that complainant had the burden of proof and that complainant's "failure to present any evidence present[ed] a total lack of meeting that burden"). *See* also Pacific Bell Telephone Company, d/b/a AT&T *California vs. Fones4All Corporation* (Cal. PUC, 2008) Decision 08-04-043, 2008 Cal. PUC LEXIS 132.

[23] *Appeal*, at 15-16.

burden of proving that any of the trip data at issue is constitutionally protected from public disclosure. Furthermore, in conducting our independent review of the trip data categories at issue, the Commission finds that none are protected from public disclosure on either trade secret or privacy grounds. As such, Lyft's reliance on generalized statements from D.20-12-021, where the Commission acknowledged that there are times when the Commission should be concerned about full public disclosure of proprietary data, is misplaced. The Commission did not find that the trip data at issue was proprietary but, instead, set forth the relevant law regarding what a party needed to establish to carry its burden of proving a trade secret claim.[24]

Finally, the Commission questions the relevancy of Lyft's reliance on Government Code § 6252, which provides that only records that shed light on the public agency's performance of its regulatory duties are deemed public records under the law.[25] Government Code § 6252(e) deals with documents written by a public employee:

> (e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.

(*See* also Cal. Const., art. I, § 3, subd. (b)(1), which provides that "the writings of public officials and agencies shall be open to public scrutiny.")

The Commission's interpretation of "writing" being limited to writings prepared by government employees finds support from *City of San Jose v.*

[24] *Appeal*, at 18.

[25] *Appeal*, at 16.

Superior Court (2017) 2 Cal.5th 608, 619, wherein in a dispute over whether e mails sent and/or received by City of San Jose employees working on a redevelopment project, the California Supreme Court stated that "a writing is commonly understood to have been prepared by the person who wrote it." And only then must the government generated writing shed light on an agency's performance of its duties or otherwise let citizens know what their government is up to.[26] As the trip data in the Annual Reports is prepared by each TNC rather than a Commission employee, it does not appear that Government Code § 6252(e) provides Lyft with any legal support for its claim of trip data confidentiality.

2.1. The Commission's Regulatory Power to Require Disclosure of Non-Private Trip Data Does Not Amount to An Unreasonable Search and Seizure Under the Fourth Amendment

We set forth both the foregoing policy favoring public disclosure, as well as the high burden that a party must demonstrate to prevent such a disclosure, in order to place Lyft's argument regarding the right to protect TNC data against unreasonable searches and seizures in the proper legal context. Lyft cites *Patel v. City of Los Angeles*, (9th Cir. 2013) 738 F.3d 1058, 1061-1062, and 1064, *aff'd sub nom. City of Los Angeles, Calif. v. Patel* (2015) 135 S.Ct. 2443 (2015), for the proposition that the government may require businesses to maintain records containing private information covered by the Fourth Amendment to the U.S. Constitution and to make that information available for routine inspection when necessary to further a legitimate regulatory interest.[27] The Commission has no quarrel with that legal proposition but notes two important distinctions that make it

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[26] *See Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 249 (Identity of public employees would not shed light on an agency's performance).

[27] *Appeal*, at 11.

inapplicable to Lyft's *Appeal*: first, the parties in *Patel* did not dispute whether the information at issue was private. In contrast, the trip data information in dispute has no presumption of privacy and, as the Commission will demonstrate, is not private. Second, *Patel* dealt with the government's ability to collect seemingly private data. In contrast, Lyft is not contesting the Commission's ability to require Lyft to collect and report data that Lyft claims is private. Instead, the question the Commission must resolve is whether the trip data that Lyft has provided to the Commission in the Annual Reports may be disclosed to the public.

Lyft's argument that having to publicly disclose trip data implicates Fourth Amendment considerations is not supported by its reliance on two recent decisions involving Airbnb. Lyft cites *Airbnb, Inc. v. City of New York* (*Airbnb New York)*[28] and *Airbnb, Inc. v. City of Boston (Airbnb Boston)*[29] as proof that administrative demands for data of private companies likely violated Airbnb's Fourth Amendment rights.[30] Lyft quotes the following two passages from *Airbnb New York*:

> [A]s the Ninth Circuit observed in *Patel*, customer-facing businesses, including in hospitality industries, "do not ordinarily disclose, and are not expected to disclose ... commercially sensitive information" such as "customer lists," other customer-specific data, and "pricing practices." [citation] ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."); [citation] As in *Patel*, where the hotels were held to have a Fourth Amendment interest in the records of their

[28] (S.D.N.Y. 2019 373 F.Supp.3d 467, 484, *appeal withdrawn*, No. 19-288, 2019.

[29] (D. Mass. 2019) 386 F.Supp.3d 113, 125, *appeal dismissed* (1st Cir., Sept. 3, 2019).

[30] *Appeal*, at 12-13.

> guests, this Court holds that platforms have privacy interests in their user-related records that "are more than sufficient to trigger Fourth Amendment protection.
>
> …
>
> Like a hotel, a home-sharing platform has at least two very good reasons to keep host and guest information private, whether as to these users' identities, contact information, usage patterns, and payment practices. One is competitive: Keeping such data confidential keeps such information from rivals (whether competingplatforms or hotels) who might exploit it. The other involves customer relations: Keeping such data private assuredly promotes better relations with, and retention of, a platform's users.[31]

But to understand the impetus why the Court was concerned about the potential breach of privacy rights, it will be helpful to examine the ordinance that Airbnb challenged. In an effort to crack down on short-term rentals that violated New York's Multiple Dwelling Laws, the New York City Council approved an ordinance that applied to booking services offered by online, computer, or application-based platforms. Each booking service was required to submit a monthly transaction report that must include for every short-term rental listed on the platform: the physical address of the short-term rental associated with each transaction, including the street name, street number, apartment or unit number, borough or county, and zip code; the full legal name, physical address, phone number and email address of the host of such short term rental; the individualized name and number and the URL of such advertisement or listing; the number of days the unit was on the platform; and the fees received.[32] Asking

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[31] *Appeal*, at 12.

[32] *Airbnb New York, supra*, 373 F.Supp.3d at 474. The ordinance at issue in *Airbnb Boston* contained similar reporting requirements. 386 F.Supp.3d at 118 quotes Section 9-14.11 of the

for actual names and addresses of the rental property and the host is similar to the type of information that the United States Supreme Court has recognized as private and that the infringement by the government into that area of privacy can trigger Fourth Amendment concerns. (*See Katz v. United States* (1967) 389 U.S. 347, 360-361; *Oklahoma Press Pub. Co. v. Walling* (1946) 327 U.S. 186, 202 [Court held that the Fourth Amendment applied to administrative subpoenas *duces tecum* issued in an investigation into violations of the Fair Labor Standards Act].)

In contrast with the private information that New York and Boston were requiring the rental platform companies to provide, Lyft is under no similar danger that such private information will be publicly disclosed. California law recognized that personally identifiable information that is obtained by a government agency like the Commission is generally protected against public disclosure.[33] The *Ruling* agreed with Uber and Lyft that such personally identifiable information could be redacted from the public version of the TNC Annual Reports.[34] The *Ruling* also agreed that latitude and longitude information could also be redacted from the public version of the TNC Annual

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Boston Ordinance: "A Booking Agent shall provide to the City, on a monthly basis, an electronic report, in a format determined by the City, ... of the listings maintained, authorized, facilitated or advertised by the Booking Agent within the City of Boston for the applicable reporting period. The report shall include a breakdown of where the listings are located, whether the listing is for a room or a whole unit[.]"

[33] (*See*, *e.g.*, Government Code § 6254(c) [personnel, medical or similar files]; and Government Code § 6254.16 [utility customer information unless disclosure is authorized by recognized exception].)

[34] *See Ruling*, at 8 ("Moving Parties argue that the driver's personal information [*i.e.* driver's first and last name, middle initial, type of identification, the driver's driver license state of issuance, number, expiration date, and VIN of the vehicle] should be treated as confidential. This *Ruling* agrees with that request.")

Reports since this information could be used to deduce an actual starting and ending address for a TNC passenger trip.

But the balance of the trip data does not implicate such constitutionally recognized privacy protections so the right to be protected from actions that violate the Fourth Amendment is not implicated. The Commission addressed its regulatory power to compel TNCs to provide trip data in the Annual Reports in D.16-01-014. Rasier-Ca, LLC, Uber's wholly owned subsidiary, challenged, on Fourth Amendment privacy grounds, the Commission authority to require TNCs to submit Annual Reports. The Commission's reasoning is instructive so we incorporate it herein by this reference.

We note that TNCs have had their Fourth Amendment challenges rejected in other jurisdictions and have been required to produce trip data. In *Carniol v. New York City Taxi & Limousine Comm'n* (Sup. Ct. 2013) 975 N.Y.S.2d 842, the Court rejected Uber's challenges to providing trip data because the expectation of privacy was not present. In reaching its decision, the Court cited to *Minnesota v. Carter* (1998) 525 U.S. 83, 88 in which the United States Supreme Court stated that a party may not prevail on a Fourth Amendment claim unless the party can show that the search and seizure by the state infringed on a legitimate expectation of privacy. Where a government entity is vested with broad authority to promulgate and implement a regulatory program for the regulated transportation industry, those participating "have a diminished expectation of privacy, particularly in information related to the goals of the industry regulation." (*Buliga v. New York City Taxi Limousine Comm'n* (2007) WL 4547738 *2, *affd sub nom. Buliga v. New York City Taxi & Limousine Comm'n* 324 Fed Appx 82 (2d Cir. 2009); and *Statharos v. New York City Taxi & Limousine Comm'n* (2d Cir. 1999) 198 F.3d 317, 325.) This is true even beyond the transportation

industry since the key is whether the industry is closely regulated. The United States Supreme Court recognized that the greater the regulation the more those subject to the regulation can expect intrusions upon their privacy as it pertains to their work. (*Vernonia Sch. Dist. 47J v. Acton* (1995) 515 U.S. 646, 657.)

TNCs in California also have a diminished expectation of privacy with respect to providing trip data in their Annual Reports in light of the Commission's extensive jurisdiction over TNCs. As provided in Article XII of the California Constitution and the Charter-party Carriers' Act (Pub. Util. Code § 5351 *et seq.*), the Commission has for decades been vested with a broad grant of authority to regulate TCPs. For example, Pub. Util. Code § 5381 states:

> To the extent that such is not inconsistent with the provisions of this chapter, the commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

This Commission found in D.13-09-045 that TNCs were TCPs subject to the Commission's existing jurisdiction.[35] Pursuant to General Order 157-D, Section 3.01, providers of prearranged transportation are required to maintain waybills which must include, at a minimum, points of origination and destination. Pursuant to General Order 157-D, Section 6.01, every TCP is required to maintain a set of records which reflect information as to the services performed, including the waybills described in Section 3.01. The Commission also found that it would expand on its regulations regarding TCPs and utilize its broad powers under Pub. Util. Code § 701 to develop new categories of

[35] D.13-09-045, at 23.

regulation when a new technology is introduced into an existing industry.[36] Given this expansive authority, TNCs would certainly have reason to expect intrusions upon their privacy as it relates to the provision of TNC services. Accordingly, Lyft's Fourth Amendment claims are inapplicable.

Second, even if the Fourth Amendment was implicated, the Commission established in D.13-09-045 its legitimate regulatory interest in requiring every regulated TNC to submit an Annual Report that is populated with the information required by the Commission's template. What *Patel* did not address, and what the Commission is addressing in this decision, is whether a party has met its burden of proving that certain information that must be submitted as part of the Annual Report is exempt from public disclosure. As such, the facts and issue before the Commission are distinguishable from *Patel*, *Airbnb New York*, and *Airbnb Boston*. Unlike the positions New York and Boston advocated in those two decisions, the Commission is not stating that Lyft or any other TNC lacks the right to assert an expectation of privacy regarding TNC data collected and reported at the Commission's behest. Instead, what the Commission held since it ended the presumption of confidentiality for TNC Annual Reports is that the TNC asserting a claim of confidentiality or other privilege must establish that claim with the requisite granularity.

2.2. Since the Commission is Not Requiring the Public Disclosure of Protected Trip Data, Lyft Fails to Establish an Unlawful Misappropriation to Trigger a Fifth Amendment Regulatory Takings Argument

Lyft asserts that the law protects the trade secrets of private companies from forcible disclosure by regulatory agencies, and cites *Bridgestone/Firestone,*

[36] *Id.*

Inc. v. Superior Court (1992) 7 Cal.App.4th 1384, 1391, *rehearing denied and opinion modified* (July 23, 1992) for the rule that disclosure may be compelled where to do otherwise would tend to conceal fraud or work a serious injustice.[37] Lyft goes further and claims that a government agency's use of private, investment-backed trip data submitted by a regulated entity may constitute an unlawful misappropriation or taking in violation of the Fifth Amendment to the Constitution.[38]

We question Lyft's regulatory takings argument. First, the Commission notes that Lyft uses the words "may constitute an unlawful Taking under the Fifth Amendment[,]" rather than an unlawful taking has or will occurred. Second, Lyft uses the phrase "may constitute unlawful misappropriation" without setting forth the elements of a misappropriation claim. In *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1172, a case which Lyft cites in its *Appeal*, the Court set forth the elements for a misappropriation cause of action:

> "Misappropriation" is defined to include "use of a trade secret of another without express or implied consent by a person who: [¶] . . . [¶] [a]t the time of . . . use, knew or had reason to know that his or her knowledge of the trade secret was: [¶] . . . [¶] [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." (Civ. Code, § 3426.1, subd. (b).)

Absent from Lyft's *Appeal* is any suggestion that the Commission was under a duty to maintain the alleged secrecy of the trip data or limit its use. In *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1008, which Lyft also relies upon

[37] *Appeal*, at 13.

[38] *Appeal*, at 14.

in its *Appeal*, the Supreme Court explained that the duty to maintain the secrecy of trade secret information could be established by demonstrating that the government entity receiving the information provided a "guarantee of confidentiality or an express promise." The Supreme Court's discussion on this point is instructive as it underscores Lyft's failure to develop its regulatory takings claim:

> But the Trade Secrets Act is not a guarantee of confidentiality to submitters of data, and, absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. Thus, with respect to data submitted to EPA in connection with an application for registration prior to October 22, 1972, the Trade Secrets Act provided no basis for a reasonable investment-backed expectation that data submitted to EPA would remain confidential.

Similarly, Lyft fails to point to any guarantee of confidentiality or an express promise that trip data would be exempted from public disclosure on privacy (*i.e.*, trade secrets) grounds. In fact, with the elimination of the presumption of confidentiality in 2020 by the adoption of D.20-03-014, Lyft knew that the only way it could prevent the public disclosure of any part of its 2020 Annual Report was to file a motion complete with a declaration that detailed each claim for confidentiality, which it did and which the assigned ALJ rejected, in part, in his *Ruling* as being factually insufficient.

Nor can Lyft hope to establish a guarantee of confidentiality or an express promise by its reference to Pub. Util. Code § 583. In D.20-03-014, the Commission rejected such an argument, making it clear to all TNCs that they may not rely on Pub. Util. Code § 583 for the proposition that information required by the Commission to be submitted is presumptively confidential:

> But Pub. Util. Code § 583 "neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential." (*Re Southern California Edison Company* (1991) 42 CPUC2d 298, 301*; Southern California Edison Company v. Westinghouse Electric Corporation* (1989*)* 892 F.2d 778, 783 ["On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities."]; and Decision 06-06-066,[39] as modified by Decision 07-05-032 at 27 [583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules.].) In fact, Pub. Util. Code § 583 vests the Commission with broad discretion to disclose information that a party deems confidential. (D.99-10-027[40] (1999) Ca. PUC LEXIS 748 at *2 [Pub. Util. Code § 583 gives the Commission broad discretion to order confidential information provided by a utility made public.].) As such, a party may not rely on Pub. Util. Code § 583 for the proposition that information required by the Commission to be submitted is confidential.

Equally unpersuasive is Lyft's generalized claim that the "Legislature has long recognized that information submitted to the Commission by regulated

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[39] *Interim Opinion Implementing Senate Bill No. 1488, Relating to Confidentiality of Electric Procurement Data Submitted to the Commission.*

[40] *Order Clarifying Order Instituting Investigation I.99-09-001 and Denying Rehearing of the Order, as Clarified.*

entities may include sensitive information that should be publicly disclosed."[41] As we will explain, none of the cited authorities deal with the Commission's right and duty to publicly disclose TNC trip data from a TNC's Annual Report. Lyft first cites Pub. Util. Code § 5412.5 which states:

> Every officer or person employed by the commission who, except as authorized by the commission or a court, discloses any fact or information from an inspection of the accounts, books, papers, or documents of a charter-party carrier of passengers is guilty of a misdemeanor and is punishable by a fine of not more than one thousand dollars ($1,000), by imprisonment in the county jail for not more than three months, or by both.

Section 5412.5 is concerned with the punishment for officers or persons employed by the Commission who disclose TCP data without Commission or court authorization. But Section 5412.5 was adopted long before TNCs were in existence and before the Commission asserted its regulatory authority. In addition, Section 5412.5 says nothing about Annual Reports that the Commission ordered each TNC to submit. And as this Commission has found, with limited exceptions, that trip data is not exempt from public disclosure, officers or persons employed by the Commission would not be punished for disclosing trip data, especially in response to requests for such information made pursuant to the Public Records Act.

Lyft's other authorities are even more attenuated as they do not address the right and duty to publicly disclose TCP or TNC information. At best, the authorities cited on pages 14 and 15 of Lyft's *Appeal*[42] deal with categories of

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[41] *Appeal*, at 14.

[42] Lyft cites *Application of Pac. Gas & Elec. Co. (U 39 e) for Comm'n Approval Under Pub. Utilities Code Section 851 of an Irrevocable License for Use of Util. Support Structures & Equip. Sites to*

information that the Commission has recognized as confidential following a sufficient factual or legal showing.[43] But in none of these decisions did the Commission say that its determinations of confidentiality or recognition of certain market sensitive data would have the universal application that Lyft seems to suggest. Such is certainly not the case with Lyft's trip data where the Commission is being asked to opine if the assigned ALJ was correct in his determination that the trip data was not trade secret protected. Lyft cannot point to any body of Commission law that, since 2020, has granted such blanket protection to TNC trip data.

Extenet Sys. (California) LLC. (Oct. 27, 2016) 2016 WL 6649336, at *3. *See also Order Instituting Rulemaking on Com'n Own Motion into Competition for Local Exch. Serv.* (Oct. 22, 1998) 82 CPUC 2d 510, at *36 ("Parties providing confidential information should be permitted to redact nonessential data and require that nondisclosure agreements be signed by those individuals who are provided access to such materials."); *Order Instituting Rulemaking on Commission's Own Motion into Competition for Local Exch. Serv.* (Sept. 2, 1999) 1999 WL 1112286, at *1 (sealing "proprietary business information concerning Ameritech's proposed operations for its first and fifth year of operations"); *In Re S. California Edison Co.*, No. 04-12-007, 2005 WL 1958415, at *1 (Aug. 9, 2005) (granting confidential treatment for number of bids received, total capacity offered to utilities from wind projects, and average price of bids, and accepting representation that "disclosure of the redacted information could drive up the price of contracts in RPS solicitations [and] reduce competition by leading certain bidders to refrain from participating in the RPS process"). (*Appeal*, at 14-15.)

[43] Lyft cites *Application of San Diego Gas & Elec. Co. (U902e) for Approval of Its 2018 Energy Storage Procurement & Inv. Plan. & Related Matter*, No. 18-02-016, 2019 WL 3017166 (June 27, 2019) at *50 (confidential versions of prepared testimony that "contain cost information related to scoring and evaluating bids in competitive solicitations … is entitled to confidential treatment"); *Application of S. California Edison Co. (U338e) for Approval of Its Forecast 2019 Erra Proceeding Revenue Requirement*, No. 18-05-003, 2019 WL 1204904 (Feb. 21, 2019) at *22 (the Commission confirmed that it "is interested in ensuring that the public has access to information related to utility rates, but also has its own rules to protect the confidentiality of market sensitive information"). (*Appeal*, at 15.)

In sum, Lyft has failed to establish the factual basis for asserting a regulatory takings claim under the Fifth Amendment.[44]

3. Standard of Review

In addition to determining whether the *Ruling* correctly concluded that Lyft failed to carry its burden of proving that the trip data at issue was protected from public disclosure on trade secret and/or privacy grounds, this Commission, in its capacity as a reviewing tribunal, must also determine if in its *Appeal* Lyft carried its burden of demonstrating that the *Ruling* should be reversed for lack of substantial evidence. Because Lyft has filed an appeal from the assigned ALJ's *Ruling*, the Commission's role is synonymous with that of a reviewing court and, therefore, it must apply the standards that a reviewing court would apply in reviewing a Commission decision.

The question we must first answer is what the standard is to apply in the Commission's determination if the *Ruling* is supported by substantial evidence. The Commission takes guidance from Pub. Util. Code § 1757 which sets forth the standards that a reviewing court employs to determine if a Commission decision or order should be reversed:

> (a) No new or additional evidence shall be introduced upon review by the court. In a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties, the review by the court shall not extend further than to determine, on the basis of the entire record which shall be certified by the commission, whether any of the following occurred:

[44] Even if Lyft could overcome the foregoing hurdles, its Fifth Amendment Regulatory Takings claim would still fail because the Commission's regulatory actions would not give rise to a viable regulatory takings claim. The Commission addressed this issue previously in D.16-01-014 and incorporates by reference the reasoning and conclusions contained therein.

(1) The commission acted without, or in excess of, its powers or jurisdiction.

(2) The commission has not proceeded in the manner required by law.

(3) The decision of the commission is not supported by the findings.

(4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.

(5) The order or decision of the commission was procured by fraud or was an abuse of discretion.

(6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

Although Pub. Util. Code § 1757 applies to complaint, enforcement, and ratesetting proceedings and the instant proceeding is quasi legislative, Section 1757, and the case law that has interpreted Section 1757, provide a helpful guide for determining if a ruling in a quasi-legislative proceeding should be reversed. In fact, Lyft references some of these reviewing standards in challenging the *Ruling* in this *Appeal*, presumably because Lyft also apparently believes Pub. Util. Code § 1757 is the appropriate standard of review. For example, in its *Appeal*, Lyft invokes, by inference, Pub. Util. Code § 1757(a)(3) and (4) when Lyft claims the assigned ALJ committed reversible error by failing to consider evidence that Lyft contends established that Lyft's trip data qualifies as a trade secret;[45] when Lyft claims that the assigned ALJ erroneously questioned if the trade secret privileges even applied to portion of the content of the Annual Reports;[46] when Lyft claims the ALJ erred in concluding that Lyft's

[45] *Appeal*, at 19-22.

[46] *Appeal*, at 23-27.

alleged trade secret data should be disclosed because it does not itself reveal Lyft's business strategies;[47] and when Lyft claims that the ALJ erred in failing to adequately consider the alleged privacy implications by ordering the public disclosure of trip data.[48] As such, it will be necessary for the Commission to summarize the guidelines that the California Supreme Court and Court of Appeal have developed to help determine if a Commission decision, order, or ALJ ruling has run afoul of Pub. Util. Code § 1757.

In *Pacific Gas and Electric Co. v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 838, the Court provided the following guidance for applying the foregoing review standards when a claim of reversible error is made pursuant to Pub. Util. Code § 1757: first, where "the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

Second, where no constitutional issue is presented, a Commission decision "has the same standing as a judgement of the superior court: it is presumed correct, and any party challenging the decision has the burden of proving that it suffers from prejudicial error."[49] In *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410, the California Supreme Court

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[47] Appeal, at 27-28.

[48] Appeal, at 28-36.

[49] In setting the standard, the *Pacific Gas and Electric* decision cites to *City and County of San Francisco v. Public Utilities Commission* (1985) 39 Cal.3d 523, 530; *Toward Utility Rate Normalization v. Public Utilities Commission* (1978) 22 Cal.3d 529, 537; and *Southern California Edison Co. v. Public Utilities Commission* (2014) 227 Cal.App.4th 172, 185.

acknowledged that "there is a strong presumption of validity of the commission's decisions." And in *Pacific Tel. & Tel. Co v. Public Utilities Commission* (1965) 62 Cal.2d 634, 647, the California Supreme Court emphasized the "strong presumption of the correctness of the findings…of the commission, which may choose its own criteria or method of arriving at its decision." Because of this presumption, judicial reweighing of evidence and testimony is ordinarily not permitted. (*Pacific Gas and Electric Co. v. Public Utilities Commission, supra,* 237 Cal.App.4th, at 838.) Instead, "when conflicting evidence is presented from which conflicting inferences can be drawn, the commission's findings are final." (*Toward Utility Rate Normalization v. Public Utilities Commission*, *supra*, 22 Cal.3d at 538.) To overturn a Commission finding for allegedly lacking the support of substantial evidence, "the challenging party must demonstrate that based on the evidence before the Commission, a reasonable person could not reach the same conclusion." (*Pacific Gas and Electric Co. v. Public Utilities Commission, supra,* 237 Cal.App.4th, at 839.) In other words, factual findings "are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence." (*Toward Utility Rate Normalization v. Public Utilities Commission*, *supra*, 22 Cal.3d at 537.)

Third, a reviewing court accords the Commission special respect as a constitutional entity tasked with interpreting and applying the Public Utilities Code and its own regulations. (*Pacific Gas and Electric Co. v. Public Utilities Commission, supra,* 237 Cal.App.4th, at 839.) "The deference may, if anything, be even greater with regulations promulgated by the agency. The Commission's interpretation of its own regulations and decisions is entitled to consideration and respect by the courts." (*Id. See also The Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 958 ["The Commission's

interpretation of its own rules and regulations is entitled to consideration and respect by the courts."].) As the *Ruling* Lyft is challenging has interpreted and applied the rules the Commission adopted in D.20-03-014 and D.16-01-014 for TNCs such as Lyft to satisfy to carry their burden of proving a claim of privilege, confidentiality, or trade secret protection, the *Ruling* is entitled to special respect and deference equal to that accorded to a Commission decision or order.

4. Lyft Failed to Meet its Burden of Proving that the Trip Data in Dispute is Protected from Public Disclosure by the Trade Secret Privilege

In 1984, California adopted, without significant change, the Uniform Trade Secrets ACT (UTSA). (Civil Code §§ 3426 through 3426.11. *DVD Copy Control Assn., Inc. v. Bunner (2003) 31 Cal. 4th 864, 874*; *Cadence Design Systems, Inc. v. Avant! Corp*. (2002) 29 Cal.4th 215, 221.) A trade secret has three basic elements:

- Information such as a formula, pattern, compilation, program, device, method, technique, or process;
- That derives independent economic value (actual or potential) from not being generally known to the public or to other persons who can obtain economic value; and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In *KC Multimedia, Inc. v. Bank of America Technology & Operations, Inc*. (2009) 171 Cal.App.4th 939, 955, the Court explained that the California UTSA (CUTSA) provides the exclusive remedy for a claimant seeking redress for a trade secret violation:

> CUTSA has been characterized as having a "comprehensive structure and breadth . . . ." (*AccuImage Diagnostics Corp. v. Terarecon, Inc.* (N.D.Cal. 2003) 260 F.Supp.2d 941, 953.) Here, the eleven provisions of the UTSA set forth: the definition of `misappropriation' and `trade secret,' injunctive relief for actual or threatened misappropriation, damages, attorney

> fees, methods for preserving the secrecy of trade secrets, the limitations period, the effect of the title on other statutes or remedies, statutory construction, severability, the application of title to acts occurring prior to the statutory date, and the application of official proceedings privilege to disclosure of trade secret information." (*Ibid.*) That breadth suggests a legislative intent to preempt the common law. (*Ibid.*; *I. E. Associates v. Safeco Title Ins. Co., supra,* 39 Cal.3d at p. 285.) At least as to common law trade secret misappropriation claims, "UTSA occupies the field in California." (*AccuImage Diagnostics Corp. v. Terarecon, Inc.,* at 954.)

Thus, if a claimant fails to establish the elements of a trade secret claim under the CTUSA, claimants have no other legal avenues for trade secret redress in common law.

In creating a trade secret protection, courts have distinguished between trade secret information versus other information connected to a business' operations. In *Cal Francisco Investment Corp. v. Vrionis* (1971) 14 Cal.App.3f 318, 322, the Court explains that distinction:

> It [trade secret] differs from other secret information in a business…in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business.

This distinction is important since trade secrets are generally the products of the creativity and hard work of the trade secret holder's efforts to further a business or otherwise reap economic rewards. (*Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1287; *American Paper & Packaging Products, Inc. v.*

Kirgan (1986) 183 Cal.App.3d 1318, 1326.) The idea behind the trade secret privilege is that those who devote time and energy to creating something of value should be protected against the use of such hard won, and economically valuable, information by others who contribute nothing to the creation of the trade secret.[50]

After setting forth the definition of what constitutes a trade secret, the *Ruling* made the following determinations:

First, Uber and Lyft failed to establish that trip data was entitled to trade secret protection. The *Ruling* reasoned that the trip data provided was not a novel compilation but, instead, constituted generalized location, driving, and time information could already be ascertained with computer modeling.

Second, the *Ruling* found that making trip data public would not compromise the competitive advantages each company tries to maintain since the Annual Reports did not require the TNCs to disclose new products and features for riders and drivers, or their internal business strategies. Each competitive TNC must perform its own analysis and develop its own strategies to market its business to the riding public, something that would not be aided by the disclosure of trip data.

Third, even if trip data enjoyed some trade secret classification, there was a legitimate public interest in making trip data public. The *Ruling* explained that municipalities and their transportation regulatory agencies have an interest in learning when riders are in operation and when trips are accepted or rejected.

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[50] *See e.g., Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc*. (*Altavion*) (2014) 226 Cal.App.4th 26, 42; *DVD Copy Control Assn. v. Brunner*, *supra*, 31 Cal.4th at 880; *San Francisco Arts & Athletics, Inc. v. United States Olympic Com.* (1987) 483 U.S. 522, 536; *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1520.

Public entities have an interest in knowing how many drivers are in operation on their roads for transportation planning purposes and would also want to know the number of times and when rides are accepted or rejected to determine if the TNC ride service was being provided to all neighborhoods in a nondiscriminatory manner. The *Ruling* concluded that application of the public interest balancing test weighed in favor of requiring the public disclosure of trip data.

Lyft challenges each of the *Ruling's* findings in its *Appeal* by claiming that (1) the *Ruling* failed to consider evidence establishing that Lyft's trip data was a trade secret and, instead, only focused on Uber's evidentiary showing; (2) the *Ruling* erroneously determined that data required to be submitted did not meet the requirements for trade secret protection; (3) the *Ruling* erred in concluding that trip data should be disclosed because others might find the information useful; and (4) the *Ruling* erred in concluding that trip data could not be a trade secret because it does not reveal Lyft's business strategies. To explain why Lyft's attacks are legally erroneous, it will be necessary to set forth and discuss the elements of a trade secret claim and apply them to the *Ruling's* findings and Lyft's objections. In doing so, we must also apply the first rule of statutory interpretation, which is to examine the actual language of that statute, giving words their ordinary everyday meaning. If the meaning is without ambiguity, doubt, or uncertainty, the language controls. (*Kavanaugh v. W. Sonoma County Union High School District* (2003) 29 Cal.4th 911, 919.)

4.1. The Trip Data in the Lyft's Annual Report is not a Protected Unique or Novel Compilation of Information

Civil Code § 3426.1(d) refers to information and includes, as examples, formulas, patterns, compilations, programs, devices, methods, techniques, or

processes. While it is true that the word "information" has a broad meaning,[51] trade secrets usually fall within one of the following two broader classifications: first, technical information (such as plans, designs, patterns, processes and formulas, techniques for manufacturing, negative information, and computer software); and second, business information (such as financial information, cost and pricing, manufacturing information, internal market analysis, customer lists, marketing and advertising plans, and personnel information). The common thread going through these varying types of information is that it is something that the party claiming a trade secret has created, on its own, to further its business interests.

4.1.1. Compilation as Unique or Novel

We focus on the word "compilation" from Civil Code § 3426.1 because it appears to be the most on point characterization of the trip data that Lyft asserts is a trade secret. Lyft does not claim that trip data is either a formula, pattern, program, device, method, or technique. Instead, Lyft's supporting Declaration from Brett Collins states that the trip data is "collected" and "captured using data collection, analysis and reporting processes," and that trip data is "continually collected, compiled and analyzed."[52] As the plain meaning of compilation is "the action or process of producing something, especially a list, book, or report, by assembling information collected from other sources," the trip data that the Commission has ordered each TNC to submit as part of its Annual Report is a compilation as that word is used in Civil Code § 3426.1.

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[51] *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.*, *supra*, 226 Cal.App.4th, at 53.

[52] *Appeal*, at 20, quoting the Collins Declaration, ¶¶26 and 27.

But finding that trip data constitutes a compilation does not end the Commission's inquiry into whether a compilation is entitled to trade secret protection. In addition to defining compilation, the *Ruling* stated for a compilation to be a trade secret the information had to be grouped in a "unique valuable way, even though the discrete elements that make up the compilation would not qualify as a separate trade secret."[53] Otherwise, any compilation of information could arguably be considered a trade secret.

The *Ruling's* requirement that Lyft must demonstrate that the compilation of trip data is novel or unique finds support in California law. (*See Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1523 [Customer list was a unique "compilation, developed over a period of years, of names, addresses, and contact persons, containing pricing information and knowledge about particular roofs and roofing needs of customers using its services].) Other jurisdictions considering this issue have also found that the party claiming that a compilation of information is a trade secret must demonstrate the novel or unique nature of the compilation. (*See, e.g. United States v. Nosal* (9th Cir. 2016) 844 F.3d 1024, 1043 ["the nature of the trade secret and its value stemmed from the unique integration, compilation, and sorting of" the information contained in the source lists.]; *Woo v. Fireman's Fund Insurance Co* (2007) 134 Washington App. 480, 488-489 [same]; *OTR Wheel Engineering, Inc. v. West Worldwide Services, Inc*. (2015) WL 11117430, [*46] at *1 (E.D. Wash. Nov. 30, 2015) ["The use of commonly available material in an innovative way can qualify as a trade secret [but] to

[53] *Ruling*, at 16.

qualify for protection as a trade secret, however, the combination must still be shown to have novelty and uniqueness."].)[54]

The Commission finds that the Collins Declaration does not establish that trip data as a whole, or any subcomponent thereof, is either novel or unique. Absent from the Collins Declaration is any explanation of the uniqueness of the disclosure of data that reveals a TNC trip that originates in zip code or census block x and terminates in zip code or census block y on date and time z. Lyft has not created the zip codes or census blocks. Zip codes were created on July 1, 1963, by the United States Postal Service.[55] The U.S. Census Bureau created census blocks, which are statistical areas bounded by visible features such as roads, streams, railroad tracks, and other nonvisible property boundaries that are delineated by the U.S. Census Bureau every ten years.[56] As these are matters beyond the control or creation of Lyft or any other TNC, there can be nothing unique or novel about trip data identifying how many trips began and ended in particular zip codes and census blocks, or on particular dates and times.

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[54] California has recognized that it is permissible to consult case law from other states applying UTSA enactments in other states is generally relevant in applying California's UTSA. (*See Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 42.) But in *KC Multimedia, Inc. v. Bank of America Technology & Operations, Inc*. (2009) 171 Cal.App.4th 939, 955 cautioned that while promoting consistent interpretation of uniform laws is a judicially worthwhile goal, California courts will not adopt another state's construction if that construction is "manifestly erroneous[,]" quoting *Estate of Reeves* (1991) 233 Cal.App.3d 651, 657.)

[55] The Commission takes official notice of this information from the Historian, United States Postal Service (May 2019) pursuant to Rule 13.10.

[56] www.census.gov/geo.maps-data/data/relationship.html The Commission takes official notice pursuant to Rule 13.10. In Exhibit A to its Appeal, Lyft has attached examples of census block information generated from the United States Census Bureau. Although Lyft has not accompanied its Appeal with a formal request for judicial notice, the Commission takes official notice of this information as it establishes the data available through publicly available census blocks.

Because of the public availability of zip codes and census block information, the *Ruling* correctly found that trip data was not trade secret protected because trip "data provides generalized locational, driving and time information that can already be ascertained with computer modeling."[57]

Lyft, however, faults the assigned ALJ for not explaining what he means by this statement and for not citing to any record evidence in support of the assertion.[58] As the Commission will explain, the ALJ was referring to matters of such common knowledge that a further explanation should not be necessary. Zip codes and census blocks are matters of public knowledge. The same can be said for information regarding what neighborhoods are more popular than others due to the presence of dining establishments and entertainment venues. A computer model can take this information and determine what would be the optimal times for directing TNC drivers to a particular zip code on a particular time of the day. If there is a special occasion such as a sporting event or concert, computer modeling can be utilized to direct TNC drivers to that event, which would include providing the TNC driver with date, time, and zip code information. .

Nor does the Collins Declaration add any factual specificity to support Lyft's uniqueness argument. At best, Ms. Collins explains how the trip data is captured internally (by "using data collection, analysis and reporting processes developed by Lyft")[59] and later stored in what Ms. Collins characterizes as "Lyft's proprietary databases."[60] But the Commission has not ordered Lyft to

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[57] *Ruling*, at 20.

[58] *Appeal*, at 22.

[59] *Appeal*, at 20, quoting the Collins Declaration, ¶26.

[60] *Id*.

turn over what it conclusively terms its "proprietary databases—just the actual trip data itself. Even if the Commission had, Ms. Collins does not explain in the necessary detail why the databases themselves are unique or that a competitor would in fact want access to them.

Similar broad-based claims have been rejected as insufficient to satisfy the uniqueness standard. For example, in *Woo v. Fireman's Fund Insurance Co* (2007) 137 Wn. App. 480, 488-489, the Court rejected the assertion that an insurance claims manual was trade secret protected because of the unique manner in which it was assembled and utilized since the supporting declarations were too general:

> It is true that the use of commonly available materials in an innovative way can qualify as a trade secret, and the proponent of a trade secret "need not prove that every element of an information compilation is unavailable elsewhere." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50, 738 P.2d 665 (1987). But to qualify for protection as a trade secret, the combination must still be shown to have "novelty and uniqueness." *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 327, 828 P.2d 73 (1992), *overruled on other grounds by Waterjet Tech., Inc. v. Flow Int'l Corp.*, 140 Wn.2d 313, 323, 996 P.2d 598 (2000).
>
> The declarations of the claims managers are too conclusory to prove that the claims manuals compile information in an innovative way. The declarations do not supply any concrete examples to illustrate how the strategies or philosophies of Fireman's Fund claims handling procedures differ materially from the strategies or philosophies of other insurers.

As the declarations in the *Woo* decision failed to do, the Collins Declaration also fails to provide any concrete examples of how Lyft's business strategies or marketing philosophies differ from the other TNCs. For example, Ms. Collins alleges that

> Lyft can gauge the effectiveness of those incentives in increasing the supply of drivers and can adjust its incentive programs going forward. Similarly, by cross-referencing its ride numbers against the particular passenger promotions run at that time, Lyft can track, assess, and understand the efficacy of its passenger-directed promotions, and can adjust them accordingly.[61]

Yet the Collins Declaration fails to demonstrate that Lyft's business practices and data analytics are any different from the practices and analytics employed at other TNCs, or that no other TNC utilizes such practices and analytics.

When competitors engage in the same or similar processes to recruit potential customers and drivers, a claim that trip data information is either novel or unique must be viewed with suspicion. In *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 1326, the Court addressed this issue in a slightly different context (*i.e.*, use of customer lists):

> The compilation process in this case is neither sophisticated nor difficult nor particularly time consuming. The evidence presented shows that the shipping business is very competitive and that manufacturers will often deal with more than one company at a time. There is no evidence that all of appellant's competition comes from respondents' new employer. Obviously, all the competitors have secured the same information that appellant claims and, in all likelihood, did so in the same manner as appellant--a process described herein by respondents.

A comparison of the Collins Declaration and the Declaration of Peter Sauerwein that was submitted in support of Uber's *Motion for Confidential Treatment* reveals that both declarants make similar claims about how their respective companies utilize trip data to further their business operations. Both Ms. Collins and

[61] *Appeal*, at 21, quoting the Collins Declaration, ¶28.

Mr. Sauerwein attest that their employers (1) compete against each other in terms of earning opportunities, app functions, and customer service (Collins Declaration ¶¶27 and 30; Sauerwein Declaration ¶4); and (2) develop new products and features through their use of the trip data to make rides more attractive to customers and drivers (Collins Declaration ¶¶27 and 28; Sauerwein Declaration ¶¶6 and 7.) While the internal data analytic process may vary at each company, both Uber and Lyft claim they are engaging in similar processes of utilizing trip data to improve customer service and maintain or improve their competitive advantage over the same pool of potential TNC passengers and drivers.

Another problem with Lyft's uniqueness argument is that it fails to establish, beyond generalized claims in the Collins Declaration, that any of Lyft's competitors would want Lyft's trip data. For example, the *Woo* Court rejected the trade secret claim that its claim manual was unique, finding that there was no concrete evidence that a competitor would want to utilize the claim manual, as well as the financial benefit that a competitor would realize:

> The declarations provide no proof that any rival company would want to copy the manuals, nor do they quantify in any meaningful way the competitive advantage that the hypothetical plagiarizer would enjoy. *See Buffets, Inc.*, 73 F.3d at 969 (restaurant chain asserting trade secret protection for fried chicken recipes did not demonstrate any relationship between competitors' lack of success and unavailability of the recipes).

Similarly, the Collins Declaration provides no proof, other than speculation, that a rival TNC would want Lyft's databases and how much revenue or market share the rival TNC would realize. At best, the Collins Declaration says Lyft's

competitors "could and would analyze and manipulate that data" but she fails to provide any facts to back up her conclusions.

4.1.2. Compiled for Regulatory Purpose

The Collins Declaration provides additional evidence that the trip data is not novel or unique, thus further undermining Lyft's trade secret claim. Ms. Collins admits that the Lyft trip data was "compiled for both regulatory reporting and business analytics purposes[,]"[62] which as the Commission will next explain, undermines any claim that the trip data itself, or how it has been categorized and reported, is either novel or unique.

The Commission's requirement that each TNC provide trip data as part of its Annual Report stems from the Commission's initial assertion of regulatory jurisdiction over the TNCs operating in California. With the adoption of D.13-09-045, the Commission dictated the contents of the information needed for the Annual Reports, as well as the manner in which that information, including trip data, would be reported. D.13-09-045 set forth various requirements that TNC must comply with, one of which was the obligation to submit verified Annual TNC Reports to the Commission that include trip data about each trip provided by a TNC driver for the 11 months prior to Annual TNC Report's due date:

> One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report detailing the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; and the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates. The verified report provided by TNCs must contain the above ride information in

[62] *Id.*

> electronic Excel or other spreadsheet format with information, separated by columns, of the date, time, and zip code of each request and the concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted. In addition, for each ride that was requested and accepted, the information must also contain a column that displays the zip code of where the ride began, a column where the ride ended, the miles travelled, and the amount paid/donated. Also, each report must contain information aggregated by zip code and by total California of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers.[63]

As the TNC business operations continue to grow, the Commission determined that additional reporting requirements were needed so that the Commission could ensure that the TNCs were operating in a safe and nondiscriminatory manner. D.16-04-041, the Commission added the following reporting categories for inclusion in the Annual Reports: data on driver suspension, data on traffic incidents and accidents arising from TNC fare-splitting services; data on zero-tolerance complaints; data on assaults and harassments; data on Off-Platform strip solicitations by drivers; and data on shared/pooled rides.[64]

The Commission also permitted its staff to supplement the trip data requirements in D.13-09-045 and D.16-04-041 to permit staff to gain sufficient information to evaluate TNC operations and to make recommendations for additional reporting category requirements. For example, the Commission's Consumer Protection and Enforcement Division (CPED) has propounded data

[63] D.13-09-045, at 31-32 (Requirement j).

[64] D.16-04-041, at 24, 49, and 56.

requests and has supplied the TNCs with additional granular data categories, along with a specimen Annual Report template.[65] For example, in the August 31, 2018 courtesy reminder to all TNCs, CPED states:

> This is a courtesy reminder that, pursuant to Decision (D.)13-09-045 Ordering Paragraph 1 and D.16-04-041, each TNC is required to submit the reports as required in the aforementioned Decisions. Please provide the required data no later than September 19, 2018, as required by law. Please utilize the data templates posted on the Commission website at http://www.cpuc.ca.gov/General.aspx?id=3989. All data should be PC compatible. In the bullet points below, Staff seeks to clarify the types of data that are required and requests a few additional pieces of information.[66]

With respect to the trip data required by regulatory requirement j in D.13-09-045, CPED add the following clarifications:

- Staff also directs each TNC to include a column that displays the time that each accepted ride began and a column that displays the time that each accepted ride ended. Note that the time of each request and the time that each request is subsequently accepted or not accepted is included in Regulatory Requirement j.
- Staff also directs each TNC to include a column that displays the name of the driver and a unique identification number representing the driver for each ride that was requested and accepted by TNC drivers and rides that were requested but not accepted by TNC drivers. The unique identification number shall be consistent for each driver and shall be the same unique identification number in all the document reports provided to the Commission under D.13-09-045 and D.16-04-041. For example, if Jane Smith did not accept Ride 1 that was requested on January 1, 2018 at 12:05 a.m. but did accept Ride 2 that was

[65] D.20-03-014, at 7.

[66] The Commission takes Official Notice of this letter pursuant to Rule 13.10.

> requested on January 2, 2018 at 12:10 a.m., then the unique identification number for Jane Smith will be the same in the data provided in the reports for both instances.

In addition to the templates and guidance, CPED also provided each TNC with a data dictionary with instructions on how the information should be populated in the Commission generated templates.[67] In sum, Lyft fails point to any aspect of the trip data it provided in the 2020 Annual Report that is not compiled in expressed conformity with the formatting requirements dictated by the Commission and the Commission's staff.

The Commission's decision that Lyft has failed to meet its burden of proof is not affected by Lyft's assertion that another jurisdiction has found that trip data is a trade secret even if it was collected and submitted for governmental compliance purposes. Lyft cites *Lyft, Inc., et al., v. City of Seattle* (2018) 190 Wn.2d 769 (*City of Seattle*), in which following a mediation Lyft and Rasier, LLC (Uber's wholly owned subsidiary) agreed to submit quarterly standardized reports that include the total number of rides, the percentage of rides completed in each zip code, pick-up and drop-off zip codes, the percentage of rides requested but unfulfilled, collision data, and the number of requested rides for accessible vehicles. The agreement gave the submitting TNC the right to designate all or parts of the reports as confidential or proprietary, and the City, while not promising confidentiality, agreed to work to achieve the highest possible level of confidentiality for information provided within the confines of state law. The City also limited access to the quarterly reports to those persons in the

[67] The link to the template and data dictionary are found on the Commission website at https://www.cpuc.ca.gov/regulatory-services/licensing/transportation-licensing-and-analysis-branch/transportation-network-companies/required-reports-for-transportation-network-companies

departments of transportation and financial and administrative services on a need-to-know basis. After reviewing the record following the denial of a public records request for two of the quarterly reports, the Washington Supreme Court acknowledge that it was "a close call" and that "while the evidence is mixed and the question is not beyond debate," it affirmed the superior courts conclusion that the zip code reports were trade secrets within the meaning of the UTSA.

The Commission declines to follow *City of Seattle* for several reasons. First, even though the Court affirmed the trial court's determination that the zip code reports were a compilation as that term was used under the UTSA, there was no discussion or finding that the compilation was novel or unique, which is a requirement under California law and other jurisdictions applying the UTSA.[68] In addition, there is no indication in *City of Seattle* that the City exercised the same level of control over the content of the reporting data that the Commission has exercised over TNCs wanting to conduct business in California. Second, the *City of Seattle* found that it was "a close call" that the record demonstrated independent economic value of the data reflected by the zip code reports, but the Commission does not see the question as a close call. As we explained above, any competing TNC can take public zip code information and cross reference it with other publicly available information to identify potential routes or for launching TNC services. Third, *City of Seattle* found that although TNC drivers possessed the beginning and ending zip codes for each trip driven, TNC drivers do not have access to the other information contained in the quarterly zip code reports. Thus, the fact that the drivers possessed some of the information did not undermine the trade secret claim.

[68] *See* discussion, *supra*, at Section 4.1.1. of this decision.

Taken together, the Commission finds that the distinguishing facts between the *City of Seattle* and the instant proceeding make *City of Seattle* an unpersuasive precedent on the question of whether trip data is a trade secret.[69]

4.1.3. Overbreadth of Lyft's Uniqueness Claim

There is an additional problem with Lyft's trade secret argument in that it is overbroad. The Commission has not asked Lyft, or any TNC, to produce their collection, analysis, and reporting processes.[70] Instead, the Commission has ordered each TNC to produce their resulting data in the manner dictated by the Commission. Thus, the Collins Declaration, and Lyft's argument by extension, blur the careful distinction between formulas and models on the one hand, and the resulting data from those formulas and model on the other hand. In *Cotter v.*

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[69] The Commission acknowledges that there have been other out of state and federal decisions that have found that some of the trip data categories at issue here are trade secret. But the Commission declines to follow these authorities as their findings are too conclusory, do not contain an application of the novel and uniqueness standard, and it is unclear if the regulating entity exercised the same level of control over the terms and manner of the trip data the Commission has ordered for the 2020 Annual Reports. (*See Rasier-DC, LLC v. B&L Service, Inc.* 2018 Fla.App. LEXIS 320; 43 Fla. L. Weekly D 145; 2018 WL 354557 [the aggregate trip data was not a trade secret, but the granular trip data was trade secret protected from public disclosure]; *Ehret v. Uber Technologies, Inc*. 2015 U.S. Dist. LEXIS 161896 [court granted motion to seal information about the number of TNC trips taken during the proposed class period]; *Lyft, Inc. v. Pennsylvania Public Utility Commission* (2015) 145 A.3d 1235; 2016 Pa. Commw. LEXIS 374 [aggregated trip data that does not reveal details about individual trip locations is not trade secret]; and *Philliben v. Uber Technologies* 2016 U.S. Dist. LEXIS 193536; 2016 WL 9185000, settled by *McKnight v. Uber Techs. Inc*. 2017 U.S. Dist. LEXIS 124534 (N.D. Cal. August 7, 2017) [number of Uber riders who have used the Safe Rides Fee service, frequency with which Uber riders use the Uber App, revenue information, and information related to safety-related expenditures et the compelling reason standard for nondisclosure].)

[70] Even if the Commission had asked, Ms. Collins does not explain how the collection and storing processes are either novel or unique. Simply identifying a database as "proprietary' does not in an of itself establish a trade secret without setting forth the necessary predicate facts. (*See Morlife, Inc. v. Perry, supra,* 56 Cal.App.4th, at 1522, citing to *American Paper & Packaging Products, Inc. v. Kirgan*, supra, 183 Cal.App.3d at p. 1325; and *Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 126, 130.)

Lyft, Inc. (N.D. Cal. 2016) 193 F.Supp.3d 1030, 2016 WL 3654454, at *2, the Court explained that while the uniquely developed formula might be protected, the resulting data is not trade secret protected:

> While the algorithms and proprietary price models that Lyft uses to set its fares and the rate of Prime Time premiums and, in turn, its commissions from those moneys are trade secrets, the bare output of those algorithms and price modes (*i.e.*, the total amount of commissions taken) is not. Though the manner in which Lyft determines its pricing is an important part of its competitive strategy, its revenue is not strategy but rather the result of that strategy.

(*See, also, Buffets, Inc. v. Klinke* (9th Cir. 1996) (Washington law) 73 F.3d 965, 968 ["This is not a case where material from the public domain has been refashioned or recreated in such a way so as to be an original product, but is rather an instance where the end-product is itself unoriginal."].)

Thus, even if the compilation had some uniqueness, Lyft's trade secret claim is being asserted too broadly. As we stated above, the Collins Declaration claims that the trip data "is compiled for both regulatory reporting and business analytics purposes."[71] In D.16-01-014, at 47-48, the Commission stated that trade secret information must be the product of the claimant's initiative, rather than in response to a regulatory agency's directive:

> In other words, the party seeking trade-secret protection has, on its own initiative, developed some product or process for its own private economic benefit. In contrast, it is the Commission that has ordered the TNCs to respond, in template format, with the trip data by zip code. The compilation is being put together at the behest of the Commission, rather than by Rasier-CA for some competitive advantage over its competitors.

[71] *Appeal*, at 20, quoting Collins Declaration, ¶26.

While Lyft referred to this passage as *dicta*,[72] the Commission elects to make a more affirmative statement—information such as trip data that the Commission requires a TNC to include in its Annual Report is not a trade secret.

The Commission notes that other courts have also determined that information required to be prepared in response to a government obligation is not a trade secret. For example, in *Spokane Research v. City of Spokane* (1999) 96 Wn. App. 565, 578, the Court stated:

> The City, not the Developers, requested the credit and financial studies from the professors and accountants for two purposes. First, for the City to investigate the credit and financial strength of the proposal for city decision making and negotiating. Second, for the City to use it to obtain favorable consideration of the HUD loan application. Both are public purposes that may incidentally advance the Developer's private interests. It is illogical for the Developers to claim the studies were at the outset trade secrets in this context because the studies were produced for the City, not the Developers.

The TNCs are assembling the TNC trip data and providing the data to the Commission in the precise manner dictated by the Commission and the Commission's staff as a condition for being permitted to conduct business in California. The trip data is not therefore a trade secret simply because Lyft may also use the trip data for its own internal business and marketing purposes.

Nonetheless, Lyft continues to challenge the conclusion that trip data required to be tracked and submitted in the Annual Reports in the manner dictated by the Commission is not a trade secret, and claims that such a conclusion has no support in the law.[73] But the flaw in Lyft's argument is that it

[72] *Appeal*, at 23.

[73] *Appeal,* at 23.

has relied on a series of decisions that recognized that the data required to be submitted to the government was confidential as a trade secret or private financial information. (*See City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 and *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 772.)

Lyft's corollary argument that the federal Freedom of Information Act, which the CPRA is modeled, includes an express exemption for information required to be submitted to a regulatory agency which also qualifies as a trade secret, is of no consequence.[74] Lyft cites *Associated Press v. Federal Bureau of Investigation* (D.D.C. 2017) 265 F.Supp.3d 82, 101, which deals with Exemption 4 under the Federal Freedom of Information Act for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." If information is required to be submitted, the information is considered confidential if "disclosure is likely ... (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." To invoke Exemption 4, one of the following must be met: information withheld must "(1) involve trade secrets or commercial or financial information; (2) be obtained from a person outside the government; and (3) be privileged or confidential." It is understandable that the Federal Government would want to protect confidential information even if that information was required to be submitted because of the underlying belief that the information has some confidentiality attended to the information. In contrast, there is no underlying confidentiality to the trip data that Lyft is required to submit in its 2020 Annual Report.

[74] *Appeal*, at 24.

We also dismiss Lyft's argument that the act of submitting data which is required by a government agency can, by itself, transform that data into a trade secret. Lyft relies on *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, in which rival pesticide companies brought suit for an injunction against the Department of Pesticide Regulation on the ground that the Department planned to use data from their applications to evaluate other applications, without their consent, in violation of Food & Agricultural Code § 12811.5. The Court reversed the granting of summary judgment since it found triable issues of fact whether parties were entitled to an injunction under the Uniform Trade Secrets Act:

> Syngenta and Dow seek only an injunction to prevent misappropriation of trade secrets under the Uniform Trade Secrets Act and do not seek to recover monetary damages under the act. " Actual or threatened misappropriation may be enjoined." (Civ. Code, § 3426.2, subd. (a).) "If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited." (*Id.*, § 3426.2, subd. (b).) Thus, if Syngenta and Dow establish misappropriation by the Department, the court has the discretion to either prohibit the Department's future use of their trade secret data or condition the Department's future use on payment of a reasonable royalty.[75]

Underlying both Syngenta and Dow's claims for injunctive relief was the understanding that the information provided to the Department of Pesticide Regulation was a trade secret. Thus, in *Syngenta* there was is a direct correlation between the government's use of submitted information and whether that information constitutes a trade secret. Here, there is no understanding that the

[75] 138 Cal.App.3d, at 1173.

trip data is a trade secret so providing this information to the Commission does not turn unprotected information into a trade secret.

Moreover, the only portion of the trip data that might constitute a trade secret need not be produced as part of Lyft's 2020 Annual Report. As the *Ruling* pointed out, the Commission has not required any TNC to produce information revealing how the trip data is utilized for business analytics purposes. Lyft has not been ordered to produce whatever algorithms it has developed to utilize the trip data. Instead, the Commission has ordered every TNC to produce the actual trip data in the manner dictated by the Commission's template and data dictionaries.[76]

The federal courts have had occasion to address similarly broad claims in resolving requests made to the Federal Government under the Freedom of Information Act and there is a legal question as to whether the requested information is a trade secret. In *Center For Auto Safety v. National Highway Traffic Safety Administration* (D.C. Cir. 2001) 244 F.3d 144, the Center sought access to information provided to the National Highway Transportation Safety (NHTS) Administration by nine airbag manufacturers and importers. The Court agreed with the Center that the information that the NHTS withheld did not qualify as trade secrets as the information sought only related to "the end product—what features an airbag has and how it performs—rather than to the production process, how an airbag is made." (*Id*. at 151.) Similarly, in *Northwest Coalition for Alternatives to Pesticides v. Browner* (D.D.C. 1996) 941 F.Supp. 197, 202, the Court found that the claim of trade secret was not adequately supported in its entirety since while it was true that each pesticide's formula was a trade secret, the same

[76] *Ruling*, at 17.

could not be said for "the common name and [Chemical Abstract System] numbers of inert ingredients," which the American Crop Protection Association acknowledged that the release "of general identifying information about inert ingredients does not reveal formulas."

A like result is dictated by the facts in this proceeding. Requiring Lyft to produce its trip data will not reveal the underlying formulas that it relies on to direct its drivers to particular zip codes or census blocks. As such, the Commission finds that Lyft did not establish by a preponderance of the evidence that disclosure of trip data from the Annual Report will result in the release of trade secret information. While the *Ruling* did not reference or discuss the Collins Declaration as the *Ruling* focused on the Uber evidence (both of whom made similar trade secret protection arguments regarding the release of trip data),[77] the Commission has reached the same conclusion that was reached in the *Ruling* regarding Lyft's failure to meet its burden of proof. As such, the Commission affirms the determination made in the *Ruling*.

Although Lyft refers to the *Ruling's* limited findings as a failure that amounts to reversible error, the Commission disagrees. The Commission finds that once the assigned ALJ determined that Lyft had failed to carry its burden of proof on the first element of a trade secret claim, it was not necessary for the ALJ to continue and determine if the additional requirements specified in Civil Code § 3426.1(d) for establishing a trade secret claim had been satisfied. This is because Civil Code § 3426.1(d)'s three requirements are written in the conjunctive, rather than the disjunctive, meaning that all three requirements must be satisfied to successfully establish a trade secret claim. This approach is

[77] *See* discussion comparing the Collins and Sauerwein Declarations, *supra*.

in accordance with decisions that have construed statutory provisions with the words "and" or "or' between the requirements. (*See Pueblo of Santa Ana v. Kelly* (D.N. Mexico 1996) 932 F.Supp. 1284, 1292 ["In this Section, the compact requirement is separated from the requirement that the compact be approved by the Secretary by the conjunctive term "and", indicating that Congress recognized as distinct the existence of a valid tribal-state compact and the approval of the Secretary putting that compact into effect."]; and *Azure v. Morton* (9th Cir. 1975) 514 F.2d 897, 900 ["As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately."].)[78]

The *Ruling's* decision to stop its trade secret analysis after Lyft had failed to satisfy its first evidentiary requirement is consistent with California's rules for statutory interpretation. When interpreting a statute that has various components, the words of a statute must be read in context, keeping in mind the nature and obvious purpose of the statute. (*Johnstone v. Richardson* (1951) 103 Cal.App.2d 41, 46.) The statutory language applied must be given such an interpretation that will promote rather than defeat the objective and policy of law. (*City of Los Angeles v. Pacific Tel. & Tel. Co.* (1958) 164 Cal.App.2d 253, 256.) Statutes or statutory sections relating to the same subject must be construed together and harmonized, if possible, to carry out the Legislature's intent. (*Mannheim v. Superior Court* (1970) 3 Cal. 3d 678, 687; and *County of Placer v. Aetna Casualty & Surety Company* (1958) 50 Cal.2d 182, 188-189.) By not continuing to construe the balance of Civil Code §3426.1(d), the *Ruling* properly construed the statute's conjunctive language as meaning that Lyft had to satisfy all three requirements, and that the failure to satisfy the first requirement mooted

[78] The official jury instruction of trade secret (CACI No. 4402) also defines the requirements of a trade secret claim in the conjunctive.

the need to determine if Lyft satisfied the balance of the statute. This approach is consistent with how the statute was drafted.[79] If the Legislature had intended that a claimant could establish a trade secret claim by not satisfying all the requirements of the statute, the Legislature would have written Civil Code § 3426.1(d) in the disjunctive, rather than the conjunctive. In sum, Lyft's assertion that the *Ruling* failed to consider the balance of Lyft's trade secret claim argument is inconsistent with the rules of statutory construction.

Moreover, the way the *Ruling* resolved Lyft's trade secret argument undercuts Lyft's claim that the ALJ's analysis was an abuse of discretion that rendered the dismissal of Lyft's claim of trade secret status arbitrary and capricious.[80] An abuse of discretion can occur when the court "transgresses the confines of the applicable principles of law." (*Gabriel P. v. Suedi D*. (2006) 141 Cal.App.4th 850, 863.) A trial court's exercise of discretion is "subject to the limitations of the legal principles governing the subject of its action, and subject to reversal on appeal where no reasonable basis for the action is shown.'" (*Nalian Truck Lines, Inc. v. Nakano Warehouse Transportation Corp*. (1992) 6 Cal.App.4th 1256, 1261.) Here, there was a reasonable basis for the ALJ's action. Since under the rules of statutory interpretation the wording of Civil Code §3426.1(d) does not require a court to analyze all of the requirements before determining if a trade secret claim has been established, the ALJ acted within his discretion in deciding that the first criterion for a trade secret claim had not been established and refrained from analyzing the remaining criteria. Thus, when the court acts

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[79] *See* 1A Singer, *SUTHERLAND STATUTORY CONSTRUCTION* § 21.14, at 20 (5th ed. Cum. Supp. 2001.) (The strict meaning of "and" and "or" should be followed when their accurate reading does not render the sense of the statute confusing and there is no clear legislative intent to have the words not mean what they strictly should.)

[80] *Appeal*, at 23.

within its discretion, there is an "absence of arbitrary determination, capricious disposition or whimsical thinking." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573.)

But since Lyft has attacked the assigned ALJ's decision not to address all elements of a trade secret claim, and as Lyft may well pursue an appeal, the Commission will explain why Lyft has also failed to carry its burden to establish that trip data (1) has independent value from not being known by those who might make use of it; and (2) has been the subject of reasonable efforts to maintain its secrecy. That way, a reviewing court will have a complete record of the Commission's reasoning.

4.2. Lyft Fails to Establish that Trip Data has Independent Value Because of its Alleged Secrecy

In *DVD Copy Control Association, Inc. v. Bunner* (2003) 31 Cal.4th 864, 881, the California Supreme Court recognized that "trade secrets are a peculiar kind of property. Their only value consists in their being kept private. Thus, the right to exclude others is central to the very definition of the property interest." (*See also Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 220-221 ["the *sine qua non* of a trade secret, the, is the plaintiff's possession of information of a type that can, at the possessor's option, be made known to other, ow withheld from them….Trade secret law, in short, protects only the right to control the dissemination of information."].) The secrecy adds to the trade secret's value 'because it is unknown to others." (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc*. (2018) 28 Cal.App.5th 923, 943.) In other words, the secrecy of the trade secret information provides the holder of the trade secret with "a substantial business advantage." (*Morlife, Inc. v. Perry, supra,* 56 Cal.App.4th, at 1522.)

Finally, in determining if a trade secret has independent value, the fact finder must consider if the claimant established the amount of time, money, or labor that was expended in developing the trip data, as well as the amount of time, money, or labor that would be saved by a competitor who used the trip data. (Judicial Council of California Civil Jury Instruction 4412 (Independent Economic Value Explained.) In *Yield Dynamics, Inc. v. TEA Systems* (2007) 154 Cal.App.4th 547, 564-565, the Court provided guidance as to the specificity of the showing to demonstrate independent value:

> Merely stating that information was helpful or useful to another person in carrying out a specific activity, or that information of that type may save someone time, does not compel a fact finder to conclude that the particular information at issue was "sufficiently valuable . . . to afford an . . . economic advantage over others." (Rest.3d Unfair Competition, § 39.) The fact finder is entitled to expect evidence from which it can form some solid sense of *how* useful the information is, *e.g.*, *how much* time, money, or labor it would save, or at least that these savings would be "more than trivial."

The Commission must address whether Lyft carried its burden of establishing the independent value of its trip data because of its secrecy.

Lyft's showing lacks the necessary specificity to satisfy the second criterion of a trade secret claim. The Collins Declaration contains the following passage where she suggests that the Lyft trip data is essential to the marketing of its TNC operations:

> The trip data is continually collected, compiled and analyzed as an integral aspect of Lyft's business operations, as the success of Lyft's business model depends upon continually optimizing the balance between ride demand and vehicle supply. Lyft endeavors to optimize supply and demand by using competitive pricing and promotions, such as ride credits

> and other discounts, to stimulate passenger demand, while increasing the supply of vehicles to areas with high demand by offering drivers minimum hour guarantees, bonuses, and other driver incentives. Lyft is continually adjusting these two levers to ensure, on the one hand, that fares are low enough to attract passengers, and, on the other hand, that fares are high enough to attract drivers. This delicate balance is central to Lyft's competitiveness in California and in markets nationwide.[81]

Next Ms. Collins discusses the value of Lyft's trip data for its operations:

> The trip data collected by Lyft allows it to continually evaluate the effectiveness of its promotional, advertising, and incentive campaigns used to balance supply and demand. For example, by comparing the number of rides completed during a particular time period in a particular location against the driver incentive programs deployed during that period, Lyft can gauge the effectiveness of those incentives in increasing the supply of drivers and can adjust its incentive programs going forward. Similarly, by cross-referencing its ride numbers against the particular passenger promotions run at that time, Lyft can track, assess, and understand the efficacy of its passenger-directed promotions, and can adjust them accordingly.
>
> Equally important, Lyft can identify those promotions that are ineffective and can avoid further expenditures on ineffective promotions.[82]

Finally, Ms. Collins offers the following explanation of what allegedly would befall Lyft's operations if the trip data were publicly disclosed:

> If Lyft's competitors, including Uber, HopSkipDrive, Wings, Silver Ride, Nomad Transit, and any other company that has obtained or might obtain a TNC permit from the Commission, were provided access to Lyft's ride data, they could and would analyze and manipulate that data to gain insights into

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[81] *Appeal*, at 20.

[82] *Id.*, at 21.

> Lyft's market share, its pricing practices, its marketing strategies, and other critical aspects of its business that it does not publicly disclose, including, for example, comparing the data to Lyft's driver acquisition programs and passenger promotions – which, by their nature, are publicly discoverable – to better understand which of Lyft's strategies are effective. This would allow a competitor to tailor its operations to more effectively deploy its resources to compete with Lyft, utilizing for its own benefit data that Lyft has generated over time and at great expense. Such a competitor would not need to invest the significant resources that Lyft has invested to test these programs and analyze the data to understand the market and optimize revenue generation. Instead, a new competitor could enter the market without substantial investment, while existing competitors could use the data to increase their market share, or undercut Lyft's marketing campaigns, by" free-riding" on Lyft's data.[83]

When read together, Ms. Collins suggests that the Lyft trip data is kept secret, and that secrecy allows Lyft to evaluate the effectiveness of its business promotions and to make upgrades as needed to provide a competitive TNC service to the riding public. In Ms. Collins' view, Lyft's ability to remain competitive would be lost if its trip data would be made public because Lyft's competitors would gain insights into Lyft's market share, pricing practices, marketing strategies, and other aspects of Lyft's business.

While the quoted paragraphs from the Collins Declaration are lengthy, collectively they fail to establish how the release of Lyft's trip data would lead to the loss of the trip data's independent value. First, the Collins Declaration fails to quantify the independent value of Lyft's trip data or the unfair competitive advantage the release of the data would bring to Lyft's competitors. She claims in the most general of terms that Lyft's trip data was captured using a process

[83] *Id.*

that was developed "over time and at great effort and expense."[84] Ms. Collins further claims that if Lyft's trip data were disclosed, Lyft's competitors "would not need to invest the significant resources that Lyft has invested[.]"[85] Ms. Collins assertions lack any quantification regarding the independent value claim and, therefore, falls short of the evidentiary showing required by the *Yield Dynamics* decision.

Second, trip data does not disclose either the "driver incentive programs deployed during that period," or the "driver acquisition programs and passenger promotions" that Ms. Collins touts.[86] The Commission has not required any TNC to include in the Annual Report any information about driver incentive and/or acquisition programs, as well as passenger promotions. All the release of the trip data would show, using the example from above, is that a passenger requested a Lyft ride from zip code x and that the ride terminated in zip code y on z date and time. That information would not reveal why the passenger requested the trip on that day or why the passenger traveled to the destination zip code y. The trip data in the Annual Report does not have a column indicating whether the passenger took advantage of a passenger promotion Lyft advertised on that day or time, or if the passenger even knew of the passenger promotion. There could be other reasons why the passenger picked that particular trip that have nothing to do with Lyft's passenger promotions. For example, a passenger may decide to take a trip because of a special occasion (*e.g.*, date, engagement with friends, movie night, going to an entertainment venue), or need to take a trip because of employment obligations, and either or both

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[84] *Appeal*, at 20, quoting Collins Declaration ¶26.

[85] *Appeal*, at 21, quoting Collins Declaration ¶30.

[86] *Appeal*, at 21, quoting Collins Declaration ¶¶28 and 30.

scenarios could be completely unrelated to Lyft's passenger promotions. Thus, the release of the trip data will not provide any insights into a Lyft customer's reason for requesting a trip, even if a competitor were to cross reference Lyft's ride numbers against the Lyft passenger promotions run at that time the trip was requested.

Similarly, the release of Lyft's trip data will not reveal any secrets about Lyft drivers or driver incentive programs deployed. As with the passenger trip data, the Commission has not required any TNC to reveal why a driver decided to log onto the Lyft app or why the Lyft driver decided to pick up a particular Lyft passenger and take that passenger to a particular zip code or census block. As the Commission does not require any TNC to provide personally identifiable information about TNC drivers, there would be no way for a competitor to gain any insights about the driving habits, patterns, or Lyft-generated driving incentives. As with passengers, there could be other reasons why the Lyft driver picked a particular day or time to log onto the Lyft app or to select particular zip codes to pick up a Lyft passenger that have nothing to do with Lyft's driver incentive programs. The Lyft driver could be working part time and the period in which the driver logged onto the Lyft app may be the only available time in which to do so given the personal or professional constraints in the driver's life. If the trip data were released, there would be no way to know what motivated a Lyft driver to log on to the Lyft app for any particular ride or time.

Nor does the Collins Declaration provide any credible rationale that Lyft's competitors could or would use Lyft's trip data to Lyft's disadvantage. Ms. Collins claims that with the trip data's release, Lyft's competitors could "manipulate that data to gain insights into Lyft's market share, its pricing practices, its marketing strategies, and other critical aspects of its business that it

does not publicly disclose[.]"[87] The Commission rejects this argument for several reasons. First, trip data does not include pricing practices outside the price of particular ride, marketing strategies, or other critical aspects of Lyft's business. Second, Collins refers to Lyft's competitors as "Uber, HopSkipDrive, Wings, Silver Ride, Nomad Transit, and any other company that has obtained or might obtain a TNC permit from the Commission[,]"[88] but fails to explain why these competitors would want the trip data or gain any insights upon receipt. Uber and Lyft occupy over 99% of the TNC market,[89] Uber has its own trip data to review for its business purposes and has not made a public records act request for Lyft's trip data from Lyft's 2020 Annual Report. Given Uber's predominant TNC market share, Lyft fails to explain why Uber would also want to analyze Lyft's trip data.

Lyft's argument is even less persuasive when we look at the smaller TNC operations. HopSkipDrive primarily transports minors[90] and Silver Ride specializes in providing rides for senior citizens,[91] but the Annual Reports do not require a TNC to list a driver's age as part of the trip data template so it is not clear what use HopSkipDrive and Silver Ride would have for Lyft's trip data. As for the "any other company that has obtained or might obtain a TNC permit," this claim in the Collins Declaration is too ambiguous and speculative to warrant further consideration as it doesn't satisfy the granularity of information standard that the Commission adopted in D.20-03-014 for establishing confidentiality

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87 *Appeal*, at 21, quoting Collins Declaration ¶30.

88 *Id*.

89 D.20-03-014, at 15.

90 *Id.*, footnote 30.

91 *Id*.

claims. As such, Lyft has failed to explain how any of Lyft's competitors would benefit by receiving Lyft's trip data that would be to the detriment to whatever independent economic value the trip data has for Lyft.

The Commission has seen courts reject similarly generalized claims as being factually insufficient to support a claim of trade secret. In *Confederated Tribes of Chehalis Reservation v. Johnson* (1998) 135 Wn.2d 734, 749, the Court stated:

> Through general statements in declarations, the Tribes maintain that their competitors would gain an advantage over them if the amount of the two percent community contributions were made public. In the Tribes' view, a potential competitor could use the two percent figure to calculate gross revenue and then could gauge the market and market saturation. Therefore, the Tribes argue, the information derives economic value from not being generally known.
>
> However, there is no evidence in the record before us that knowledge of a casino's profitability could not be generally ascertained by visiting the casino site, through newspaper articles about the casino, or through employees, tribal members, or local service agencies which are recipients of community contributions. Even if the information were not readily ascertainable, there is no evidence in the record to support the Tribes' contention that the information derives "independent economic value" from not being generally known.

Courts have also refused to recognize prices or fees as having independent economic value when different variables can go into calculating the price or fee. In *Belo Management v. Click!Network* (2014)184 Wn.App. 649, 658, the Court stated:

> Similarly, here, the broadcasters' allegations of harm are too conclusory and speculative. They make the same argument as the firm in Robbins: Release of this information would give competitors an unfair advantage. This reason alone is

> insufficient to prove that the information is a trade secret. The broadcasters have not proven that their prices have independent economic value to their competitors or other cable systems. As the broadcasters concede, every negotiation is different. Markets and cable systems vary. Prices fluctuate over time. Thus, it does not follow that the other cable systems could viably argue that they are entitled to the same price as a cable system in a different market during a different time period.

The Commission is similarly unpersuaded by Lyft's attempts to rely on secondary sources to establish its claim that the trip data has acquired independent value. Lyft cites to articles and reports that allegedly analyze the monetary value of mobility data. The problem with Lyft's position is that it has failed to establish the admissibility threshold for the Commission to consider these materials. D.20-03-014, OP 2.h. orders any TNC claiming confidentiality as to any of the data in its 2020 Annual Reports must submit a declaration under penalty of perjury that substantiates the claim:

> The TNC must provide a declaration (executed with personal knowledge and under penalty of perjury) in support of the legal authority relied on to support the confidentiality claims for Government Code §§ 6254(k) and 6255(a), General Order 66, Civil Code §§ 3426 through 3426.11, Government Code § 6254.7(d), and any other statute, rule, order, or decision that the TNC is relying upon to support each claim of confidentiality.

Lyft has not met that evidentiary showing. Lyft failed to submit any declarations from the authors of these reports and studies. Ms. Collins is not the author of the reports and studies so she cannot authenticate them. While it is true that generally the technical rules of evidence need not be applied in hearings before

the Commission,[92] D.20-03-014 has imposed a higher evidentiary standard to substantiate a confidentiality claim, and Lyft has failed to meet that enhanced evidentiary showing. Thus, these articles and reports will not be considered by the Commission as they are not admissible.

4.3. Lyft Fails to Establish that it has Taken Reasonable Efforts to Maintain the Secrecy of its Trip Data

A person or entity claiming a trade secret must also demonstrate that the claimant made "efforts that are reasonable under the circumstances to maintain its secrecy. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304.) The Court went further to explain why the absence to maintain the secrecy of a trade secret dooms a trade secret claim:

> Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. "If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished." (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1002; *see* Legis. Com. com., 12A West's Ann. Civ. Code (1997 ed.) foll. § 3426.1, p. 238 ["the trade secret can be destroyed through public knowledge"]; 1 Milgrim on Trade Secrets (2001) § 1.05[1], p. 1-197 ["unprotected disclosure . . . will terminate . . . and, at least prospectively, forfeit the trade secret status"].)

In determining if reasonable efforts to protect a trade secret's secrecy have been made a court can consider the following factors: whether documents or computer files containing the trade secret were marked with confidentiality warnings; whether the claimant instructed the employees to treat the trade secret as confidential; whether the claimant restricted access to the trade secret;

[92] Rule 13.6.

whether the trade secret was kept in a restricted or secured area; whether employees had to sign a confidentiality or nondisclosure agreement to access the trade secret; and the extent to which any general measures taken would prevent the unauthorized disclosure of the trade secret.[93]

Lyft fails to satisfy the reasonable efforts standard. The Collins Declaration contains the following discussion regarding Lyft's efforts to maintain trade secret confidentiality:

> Lyft stores the information on a secure software network protected by appropriate computer security controls, access to which is limited to a subset of Lyft employees who have been individually approved and use such information only to fulfill their job functions. Lyft also requires, as a condition of employment, that all new employees sign a confidentiality agreement. This agreement is put in place to protect Lyft's proprietary information from being disclosed by employees or former employees to unauthorized outside parties. The company also requires all employees to sign Lyft's employee handbook, which describes in detail each employee's obligations regarding technology use and security and protection of Lyft's confidential and proprietary information; and requires all visitors to Lyft headquarters to read and sign a non-disclosure agreement before proceeding past the reception desk. Furthermore, since the Commission issued General Order 66-D, Lyft has consistently complied with that order in seeking confidential treatment for the data it has identified as confidential herein, and otherwise vigorously protects such information from public disclosure.[94]

The thrust of the Collins Declaration, read in a manner most favorable to Lyft's position, is that the secrecy efforts are focused internally on Lyft's employees.

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[93] CACJI No. 4404 (Reasonable Efforts to Protect Secrecy). Some of the factors from CACJI No. 4404 are listed in *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454.

[94] *Appeal*, at 22.

The problem with the Collins Declaration is her singular focus on Lyft employees. Ms. Collins does not address if Lyft drivers are employees, and whether Lyft drivers' and Lyft passengers' access to Lyft's trip data is dependent on them agreeing to maintain trip data confidentiality. As to the first point (*i.e.,* are Lyft drivers' employees), Lyft has consistently argued in its filings before this Commission and in civil actions filed in state and federal court that Lyft drivers are independent contractors rather than employees. (*See People v. Uber Technologies, Inc., et al*., (2020) 56 Cal.App.5th 266, 278 ["The contracts between defendants and the drivers provide that the relationship between Lyft or Uber, on the one hand, and the drivers on the other, is not one of employment….Lyft's Terms of Service provide that the driver and Lyft 'are in a direct business relationship, and the relationship between the parties under this Agreement is solely that of independent contracting parties[.]'"]; *Cotter v. Lyft, Inc.* (N.D. Cal. 2015) 60 F.Supp.3d 1067, 1070 ["The plaintiffs and Lyft have filed cross-motions for summary judgement, with the plaintiffs urging the Court to declare them 'employees' as a matter of law, and Lyft urging the Court to declare them 'independent contractors' as a matter of law."]; and *Comments of Zimride, Inc.* (now Lyft), at 4, filed on February 11, 2013 in this proceeding ["Zimride does not employ or compensate drivers[.]".)[95] Lyft considers the TNC drivers to be independent contractors, a point that the Collins Declaration does not contradict.

As to the second point (*i.e.*, whether a Lyft driver must maintain trip data confidentiality) the Collins Declaration is also silent. There is no reference to the

[95] On November 4, 2020, California voters passed Proposition 22, which gave TNC companies such as Uber and Lyft the right to classify their drivers as independent contractors: "an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met[.]"

Lyft Terms of Service to indicate that Lyft drivers are contractually bound to keep trip data secret. So, when a Lyft driver logs onto the Lyft app in order to connect with a TNC passenger, the Lyft driver knows what zip code from which the proposed ride originates and where it will terminate, and with that information the Lyft driver can determine the census block from where the ride commences and terminates. The Lyft driver will also know the date and time of the trip as well as the fare. To the extent Lyft has provided the Lyft driver with advice on the best zip codes to travel to, as well as the best times of the day to work in order to maximize the number of passenger ride requests, that information is also in the Lyft driver's possession. Likewise, to the extent Lyft has utilized driver incentive programs to secure more frequent Lyft drivers, the drivers are aware of the incentive programs and are under no requirement to keep this information confidential.

Even more damaging to Lyft's secrecy claim is the fact that Lyft does not claim that Lyft drivers may only work for Lyft or that the driver may not use the learned trip data if the driver logs on to another TNC app to provide passenger services. In fact, it is not uncommon to see a TNC vehicle with both Lyft and Uber trade dress insignias. This means that a Lyft driver who has received the trip data described in the foregoing paragraph is free to transport that trip data and use it while driving for Uber or any other permitted TNC operation. There is also no impediment to a Lyft driver sharing the trip data with Uber or any other permitted TNC operation. Thus, Lyft's failure to establish that its drivers must sign an exclusivity driving agreement as well as a nondisclosure agreement undermine the trade secret claim since the Lyft drivers are being provided with unrestrained access to alleged trade secret trip data.

Lyft passengers also have access to Lyft's trip data as it relates to the trip that the passenger has contracted with the Lyft driver to provide. Every passenger knows the originating and terminating zip codes (and by extension the census blocks) of every requested trip as well as the cost of the trip. To the extent the Lyft passengers have chosen a particular ride as a result of a Lyft passenger promotion, the passenger is not required to keep that information secret. The Collins Declaration does not claim that passengers logging on to the Lyft app are required to execute a confidentiality agreement and not disclose the trip data information and incentives offered to induce the passenger to take a particular trip. To the contrary, Lyft passengers are free to communicate their trip data knowledge to Uber or any other permitted TNC operation.

The United Sates Supreme Court explained in *Ruckelshaus*, *supra*, 467 U.S. at 1002, that such unrestricted access to and use of alleged trade secret information is fatal to establishing a trade secret claim: "If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished." (*See also DVD Copy Control*, *supra*, 31 Cal.4th, at 881 ["Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data."].) In sum, Lyft's internal measures to limit employee access to trip data are insufficient to satisfy the reasonable efforts standard as "they are not designed to protect the disclosure of information" by the Lyft drivers and Lyft passengers. (*Klinke*, *supra*, 73 F.3d, at 969.)

4.4. Balancing Test Considerations Weigh in Favor of Disclosing Alleged Trade Secret Information

Even if the Commission were to find that Lyft had carried its burden of proof and established its trade secret claim for trip data, that in and of itself would not prevent the Commission from disclosing the trip data to the public. That is because there are two statutes that require the Commission to balance the trade secret claim against the strong public policy favoring the disclosure of records in a government agency's possession.

4.4.1. Evidence Code § 1060 and the Interplay with Government Code § 6254(k)

Gov. Code § 6254(k) provides an exemption for "Records, the disclosure of which is exempted or prohibited by federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." The Evidence Code includes several privileges that a privilege holder may assert as a basis for refusing to provide evidence and, in certain cases, to prevent others from disclosing the information. Such evidentiary privileges include the trade secret privilege (Evidence Code §§ 1060-1061). If a state agency determines that certain information is subject to one of these privileges, or similar federal or state laws exempting or prohibiting disclosure, it may withhold information from its response to CPRA requests on the ground that such information is exempt from mandatory disclosure, pursuant to Gov. Code § 6254(k).

However, while evidentiary privileges such as the trade secret privilege are incorporated into the CPRA as potential bases for an agency to assert the Gov. Code § 6254(k) exemption, an assertion of the trade secret privilege by an entity that submits information to a governmental agency does not guarantee

nondisclosure.[96] A party asserting the trade secret privilege under Evidence Code § 1060 bears the burden of proving that the information it wishes to keep secret meets all elements in the Civ. Code § 3426.1(d) definition of a "trade secret."[97] Evidence Code § 1060 provides that: "If he or his agent (sic) or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." Thus, in addition to proving that information falls within the applicable statutory definition of a trade secret, one who wishes to avail itself of the privilege to refuse to disclose, and to prevent another from disclosing, asserted trade secret information, the moving party must prove that the "allowance of the privilege will not tend to conceal fraud or otherwise work injustice." If the Commission believes that accepting the claimed privilege will conceal a fraud or work an injustice, it is not required to honor the party's Evidence Code § 1060 trade secret privilege claim.[98] Application of the foregoing test to the instant *Appeal* leads the Commission to conclude that concealing Lyft's alleged trade secret protected trip data would work an injustice as there is a strong public interest in obtaining trip data. As the *Ruling* found:

> There is a public interest in learning when riders are in operation and when trips are accepted or rejected. Public

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[96] *See e.g., Amgen, Inc., supra*, 47 Cal.App.5th at 732.

[97] Cal. Evidence Code § 500: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (*See also*, Cal. Evidence Code § 405; *Agricultural Labor Relations Board v. Richard A. Glass Co., Inc.* (*ALRB*) (1985) 175 Cal.App.3d 703.)

[98] *See Uribe v. Howie* (1971) 19 Cal.App.3d 194, 205-207, and 210-211; and *Coalition of University Employees v. The Regents of the University of California* (Super. Ct. Alameda County, 2003, No. RG03-0893002) 2003 WL 22717384. In conducing the balancing test the courts found that the public interest in disclosure outweighed the claimed need for secrecy.

> entities have an interest in knowing how many drivers are in operation on their rides for the planning purposes identified above, and would also want to know the number of times and when rides are accepted or rejected to determine if the TNC ride service is being provided to all neighborhoods in a nondiscriminatory manner. County district attorneys or the state attorney general may want to use this data to bring the necessary enforcement actions in civil court.[99]

The planning purposes that the *Ruling* referenced are those identified in the Comments from the San Francisco Municipal Transit Agency, San Francisco County Transportation Authority, San Francisco City Attorney's Office, and the San Francisco International Airport *Opening Comments on Proposed Decision Re; Data Confidentiality Issues:* trip data information is relevant in determining the impact of TNC services on their infrastructure, environmental impacts, traffic patterns, and the overall quiet enjoyment of their cities and counties.[100] In fact, Lyft put the question of the environmental and infrastructure benefits of TNC rides as basis for allowing them to operate when Lyft filed its initial Comments in this proceeding:

> Giving people viable and convenient alternatives in transportation – as a complement to public transit, taxis, carsharing, carpooling, etc. – is the critical element that makes reduced individual car ownership and use of single occupancy vehicles achievable. For platform-based communities to reach the critical mass tipping point at which they can significantly contribute to reduction of urban congestion, greenhouse gas emissions, and other problems caused by single-occupant driving, such communities must be

[99] *Ruling*, at 20-21.

[100] *Ruling*, at 19 and footnote 37.

> allowed to develop and flourish without unnecessary or ill-fitting regulatory barriers.[101]

It would not be surprising for local government entities to want access to the trip data to evaluate whether the claimed environmental and infrastructure benefits from allowing TNC vehicles to operate have been realized. In fact, the San Francisco Municipal Transportation made such an argument in its comments on Issue Track 3—Trip Data:

> San Francisco's transportation planners need TNC trip data to perform their duties. Under the City's charter, SFMTA has a responsibility to the general public to plan the transportation infrastructure for the future, manage congestion, and manage curb space appropriately. Without TNC data, SFMTA transportation planners must rely instead on anecdotal information to fill the gap, but such information does not present an accurate depiction of conditions on the ground. Creating public policy on factual, real time data, is clearly preferable. Here, the CPUC already requires TNCs to report much of the relevant data. Sound public policy requires the CPUC to make it available to allow local jurisdictions to make intelligent, supported transportation planning decisions for the benefit of all Californians.

In its *Appeal*, Lyft does not challenge the validity of the claims of municipalities for access to trip data that the *Ruling* cited.

In a recent California decision, the Court of Appeal recognized a municipality's interest in obtaining a TNC's trip data goes beyond environmental and infrastructure matters. In *City and County of San Francisco v. Uber Technologies, Inc.* (2019) 36 Cal.App.5th 66, 73-74, the Court acknowledged that the San Francisco City Attorney has a broad right to investigate when it suspects an entity operating withing its jurisdiction is violating the law, citing to

[101] Zimride (now Lyft) *Comments*, filed February 11, 2013.

California Restaurant Assn. v. Henning (1985) 173 Cal.App.3d 1069, 1075. The San Francisco City Attorney claims it began its TNC investigation to determine:

- Whether Uber was violating the law in several areas relating to unsafe driving and illegal parking, the congestion and volume of Uber vehicles, inequality of access and treatment of passengers, and the distance driven by Uber drivers prior to commencing a shift, after media reports that Uber incentivizes drivers to drive as much as 200 miles or more before driving for an additional 12 to 16 hours, crowding the City's streets with unfamiliar and fatigued drivers.
- Whether Uber was violating California nuisance law, Civil Code §3479, since the number of TNC vehicles might obstruct the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use, in the customary manner, of any public park, square, street, or highway.
- Whether Uber was failing to provide adequate accommodations for disabled riders and, possibly, in violation of the Unruh Civil Rights Acts (Civil Code §51, subd. (b) and Civil Code §54) and other state laws protecting individuals with disabilities.
- Whether Uber was underpaying its drivers and thereby violating San Francisco's independent minimum compensation ordinance (S.F. Administrative Code, ch. 12V).[102]

The Court found that the administrative subpoena seeking Uber's Annual Reports submitted to the Commission from 2013 to 2017, as well as the raw data the reports were based, was relevant to the City's investigations into possible violations of the law:

> The CPUC reports requests are reasonably relevant to the City's investigation of possible violation of state and

[102] 36 Cal.App.5th, at 74-75.

> municipal laws by Uber. (citation omitted.) The CPUC reports contain information and data regarding safety problems with drivers, as well as hours and miles logged by drivers, which are relevant to the City Attorney's investigation of safety hazards, parking violations, and other possible violation of state nuisance law. The accessibility plans and the data on providing accessible vehicles included in the CPUC reports are clearly relevant to the City Attorney's investigation of possible violations of state law protections for individuals with disabilities.

The Commission finds that public entities would also be interested in Lyft's trip data for all the foregoing reasons, and it would result in an injustice to deny the public access to this trip data. Lyft is one of the largest TNCs operating in California, so its reach and impact on municipalities where it conducts business is no doubt pervasive. Several investigations into whether a TNC such as Lyft is operating in violation of various state and local laws would be stymied if governmental entities could not review the relevant trip data. Accordingly, assuming that the trip data was a trade secret, keeping that trip data private is outweighed by the injustice inflicted on governmental entities who would be denied access to trip data.

Rather than challenge other government agencies' interests in obtaining trip data, Lyft claims, incorrectly, that the fact that other government agencies "might find Lyft's data useful for various purposes cannot justify denying confidential treatment to that data—and indeed cannot even be considered under the CPRA."[103] The statement that Lyft quotes from *City of San Jose v. Superior Court* (1999) 74 Cal.Ap..4th 1008, 1018 is one where the Court construed the application of Government Code §6255(a) which states:

[103] *Appeal*, at 27.

> The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

The City of San Jose filed opposition to the San Jose Mercury's petition for writ of mandate, which sought the production of citizen complaints about airport noise. In its opposition, the City of San Jose argued that the airport noise complainants' privacy interest in their personal information outweighed the public interest in disclosure of their names, addresses, and telephone numbers. If this personal information was disclosed, the complainants would be subject to harassment and intimidation, and the public's reporting of airport noise complaints would be chilled. When weighing the City of San Jose's right under Government Code § 6255 to refuse to produce records, the Court said: "The burden of proof is on the proponent of nondisclosure, who must demonstrate a "clear overbalance" on the side of confidentiality. ([Govt. Code] § 6255; *Black Panther Party*, *supra*, 42 Cal.App.3d at 657.) The purpose of the requesting party in seeking disclosure cannot be considered."[104] As such, the validity of the government's objection to a Freedom of Information Act request in *City of Jan Jose* did not turn on the resolution of the interplay between Government Code § 6254 and Evidence Code § 1060, statutes that do permit consideration of a third party's interest in obtaining government records.

[104] *See also U.S. Department of Justice v. Reporters Committee for Freedom of Press* (1989) 489 U.S. 749, 772: "Thus, whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.'

In sum, the Commission finds that it would work a manifest injustice if interested local entities were prohibited from gaining access to trip data.

4.4.2. Government Code § 6255 Public Interest Balancing Test

Government Code § 6255(a), the text of which was quoted above in Section 4.4.1. of this decision, is the catch-all provision which may be used for determining the confidentiality of records not covered by a specific exemption enumerated in the CPRA. This provision allows an agency to balance the public interest that would be served by withholding information with the public interest that would be served by the disclosure of the information. (*Humane Society of the United States v. Superior Court* (2013) 214 Cal.App.4th 1233, 1255.) To withhold information, the agency must find that the public interest served by not disclosing the record clearly outweighs the public interest served by the disclosure of the record. Under this CPRA balancing test, a submitter of information requesting confidential treatment under Government Code § 6255(a) "must identify the public interest and nor rely solely on private economic injury." (D.17-09-023, at 44.) While the public's right to information in possession of the government must be construed broadly, *Humane Society* cautions that "exemptions are to be construed narrowly." (214 Cal.App.4th, at 1254.) Finally, although Government Code § 6255(a) references the "agency," suggesting that it is incumbent on the government entity holding the information to establish that the catch-all exemption applies, the burden of proof as to the application of an exemption is on the proponent of nondisclosure. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071.) In this case, the burden would be on Lyft to establish, by the preponderance of the evidence, the applicability of the catch-all exemption.

4.4.2.1. Does the Public interest in Nondisclosure Clearly Outweigh Disclsoure?

As this catch-all exemption comes into play only if the confidentiality of records is not covered by a specific exemption enumerated in the CPRA, Lyft cannot assert that the trip data is protected by the trade secret privilege. The question the Commission must address is what proof Lyft offered, beyond its claims of trade secret protection, to avail itself of the catch-all exemption to prevent the disclosure of trip data. In its motion, Lyft raised the possibility that the trip data can lead to competitor companies and anyone gaining access to the trip data learning a rider's exact pick up and drop off addresses which could reveal personal information about the passenger (*e.g.*, gender, sexual predisposition, political affiliation, *etc.*):

> If such data were publicly disclosed, the data could be mined to identify specific individuals and track their movements, *potentially* disclosing extremely sensitive private details regarding their lives, such as intimate personal relationships, marital infidelity, political affiliations, and even sensitive health information. (Italics added.)[105]

Lyft makes a similar argument in its *Appeal*:

> Consider the revealing information one can learn with just a few details regarding a TNC ride, such as the precise time and general location at which the ride commenced. A spouse might, for example, ascertain the true destination of their partner after they leave the house; whether to the office located in one census block or zip code, or to a suspected paramour's residence, a healthcare or psychiatric facility, a political rally, or another suspected location in a different census block or zip code….Put simply, it is impossible to anticipate—and confidently dismiss—the virtually endless

[105] Lyft's *Motion*, at 26-27.

> nefarious purposes to which such a massive, detailed, and content-rich database *might* be put. (Italics added.)[106]

In support of the arguments from its *Motion* and *Appeal*, Lyft references a series of secondary source articles and informational maps from the US Census Bureau as its factual support.[107]

The Commission rejects Lyft's argument for two reasons. First, the argument lacks support from a declaration under penalty of perjury with the necessary granularity required by D.20-03-014, OP 2.h. None of the authors of the various studies that Lyft cites to have declarations authenticating their studies. Lyft's argument is inadmissible hearsay. .)].") As Lyft is offering these studies for the truth of the matter asserted (*i.e.*, that trip data can be manipulated to reveal private information about a TNC passenger) and no explanation has been offered for why the authors of the studies could not provide declarations or show that the studies somehow fit within a hearsay exception, the studies are inadmissible hearsay under California law.

The outcome is the same in proceedings before the Commission, notwithstanding the fact that the Commission utilizes a more relaxed evidentiary admissibility standard. In *Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.app.4th 945, the Court of Appeal addressed the question of the Commission's ability to accept and rely of hearsay evidence as the sole support for its finding on a disputed issue of material fact.

In resolving the evidentiary objection to relying on evidence from a person who was not present at the hearing, the Court of Appeal noted that there is a distinction between the admissibility and substantiality of hearsay evidence,

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[106] *Appeal*, at 31.

[107] Lyft's *Motion*, at 26-27, and footnotes 144-147. *Appeal*, at 30-33.

citing to *Gregory v. State Board of Control* (1999) 73 Cal.App.4th 584, 597. Hearsay is admissible in an administrative hearing if it is relevant and "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs[.]" (*Id.*, citing to *Funke v. Department of Motor Vehicles* (1969) 1 Cal.App.3d 449, 456. The Commission has found in prior decisions that it would not rely on the hearsay opinions of unavailable experts. (*Cleancraft, Inc. v. San Diego Gas and Electric Co.* (1983) 11 Cal.P.U.C.2d 975, 984 [unsubstantiated hearsay not sufficient on its own to establish an essential fact.) Thus, for the Commission to rely on hearsay evidence, the evidence must first pass the admissibility test.

The Commission finds its decision in *Cleancraft* to be applicable here and concludes that the unsworn reports that Lyft references in its *Appeal* fail the admissibility test. Lyft is asking the Commission to accept the opinions of authors who are supposedly experts in the field of data manipulation and extrapolation, none of whom provided declarations under oath. Lyft offers no explanation why it couldn't obtain declarations from these authors, especially since they would have been offered to resolve a disputed issue—whether trip data is a trade secret. Thus, the Commission rejects Lyft's request to admit and consider these unsworn reports as they are not the type of evidence the Commission is accustomed to relying upon to resolve a disputed issue of material fact.

Second, even if the unsworn hearsay reports were admissible, the Commission would not give the reports any weight because they fail the substantiality test. In *Utility Reform Network*, the Court offered the following guidance:

> As the California Supreme Court has explained, "mere admissibility of evidence does not necessarily confer the status of `sufficiency' to support a finding *absent other competent evidence.*" (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 538, fn. 3 [189 Cal.Rptr. 512, 658 P.2d 1313], italics added (*Daniels*).) "There must be substantial evidence to support ... a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end." (*Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881 [129 P.2d 349] (*Walker*), overruled on another ground in *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 37, 44.[108]

California Courts refer to the substantiality test as the "residuum rule," under which the substantial evidence supporting an agency's decision must consist of at least "a residuum of legally admissible evidence." (223 Cal.App.4th, at 960-961.)

The Commission must determine if there is other competent substantial evidence to support Lyft's contention that trip data is a trade secret, and the answer is no. First, as the Commission explained, *supra*, the flaws in the Collins Declaration are fatal to Lyft's assertion that trip data is trade secret protected. Second, as for the US Census Bureau information that Lyft attached as Exhibit A to its *Appeal*, Lyft does not document that its passengers have requested Lyft rides to or from the census blocks that Lyft argues contain small numbers of households that would make it easy to identify a passenger's identity. Moreover, while the Commission takes official notice of the existence of census blocks, it does not take official notice of the Disclosure Avoidance Modernization project that Lyft cites to as it is inadmissible hearsay.

[108] 223 Cal.App.4th, at 960.

In addition to the hearsay problems attendant to the studies that Lyft proffered, Lyft has not carried its burden of proof because the arguments regarding harm to Lyft's passengers if trip data were released are speculative at best. That is why the Commission italicized the words "potentially" in Lyft's *Motion* and "might" in Lyft's *Appeal*—they underscore the speculative nature of the harm that Lyft claims might befall passengers who avail themselves of the Lyft app for transportation and if their trip data is disclosed. Put another way, Lyft has failed to present *any* admissible evidence that the public interest favoring nondisclosure greatly outweighs the public interest favoring disclosure.

The Commission is on solid legal ground in rejecting Lyft's request to keep trip data confidential. In *Humane Society*, the Court cautioned against accepting as true unsubstantiated invasion of privacy claims as a basis for invoking Government Code § 6255(a):

> HSUS relies on an Attorney General opinion (81 Ops.Cal.Atty.Gen. 383 (1998)) that says speculation is not a basis for denying disclosure. As reflected in that opinion, the Attorney General was asked whether senior citizens' claims for parcel tax exemptions levied by a school district are subject to public inspection. Balancing the interests, the Attorney General concluded that the claims must be disclosed. Regarding the interests on the nondisclosure side of the balance, the Attorney General observed, "if the information in question is not disclosed, the rights of privacy of the senior citizens in the district would be protected. Arguably, they would not be subject to unwanted solicitations directed to them due solely to their having surpassed the age of 65. Such speculation, however, is not a basis for denying disclosure under the terms of section 6255."
> (81 Ops.Cal.Atty.Gen., *supra,* at p. 387.) Thus, the privacy

> concern noted by the Attorney General was nothing more than an unsubstantiated fear, not supported by evidence.[109]

Other decisions have also rejected catch-all exemption claims based on speculative assertions of privacy invasions. (*See CBS v. Block* (1986) 42 Cal.3d 646, 652; *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579, 1581, 1586; and *California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 835.)

The Commission considers the foregoing authorities instructive. The "likely" claim that *California State University* rejected as legally insufficient is synonymous to Lyft's claims of privacy invasion that are couched around the words "potentially' and "might." In both *California State University* and here, the claims are speculative and supported only by inadmissible hearsay. Similarly, *CBS*' and *New York Times'* rejection of the applicability of the catch-all exception based on the claim of "possible endangerment" and "could expose,"respectively, is the equivalent of Lyft's use of the phrase "potentially disclosing extremely sensitive private details." In sum, based on our review of the evidentiary record, the Commission concludes that Lyft has failed to carry its burden of proving that the public interest from nondisclosure of the trip data greatly outweighs the public interest from disclosure of the trip data.

4.4.2.2. The Public's Interest in Disclosure of Lyft's Trip Data Greatly Outweighs Nondisclosure.

In *International Federation of Professional Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319, 328-329, the California Supreme Court spoke to the essential value of an open government, which includes access to government records:

[109] 214 Cal.App.4th, at 1257.

> Openness in government is essential to the functioning of a democracy. "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process….
>
> As the result of an initiative adopted by the voters in 2004, this principle is now enshrined in the state Constitution: "The people have the right of access to information concerning the conduct of the people's business, and therefore, . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).)

In the case of the Commission, regulatory transparency is essential to the public's understanding as to how the Commission is performing its responsibility of regulating entities under its jurisdiction, and to instilling confidence in the public that the Commission is ensuring that entities under the Commission's control are providing services to Californians in a safe, reliable, and nondiscriminatory manner.

When faced with a claim that the catch-all exemption prevents the disclosure of documents in the government's possession, *Humane Society* teaches us on how to balance the two conflicting interests:

> If the records sought pertain to the conduct of the people's business there *is* a public interest in disclosure. The *weight* of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate.' (*Citizens for a Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 715 [217 Cal.Rptr. 504], italics added.) The existence and weight of this public interest are conclusions derived from the nature of the information." (*Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 616 [65

> Cal.Rptr.2d 738] (*Connell*); accord, *County of Santa Clara, supra,* 170 Cal.App.4th at p. 1324.)
>
> As the court put it in *County of Santa Clara* and *City of San Jose,* "the issue is `whether disclosure would contribute significantly to public understanding of government activities.'"

Thus, in assigning *weight* to the general public interest in disclosure, courts should look to the "nature of the information" and how disclosure of that information contributes to the public's understanding of how the government function and if that functioning is in the best interests of Californians.

- The nature of the information and how it is used

The trip data that the Commission has ordered each TNC to submit in its Annual Report provides the Commission, the agency tasked with regulatory oversight over TNC, with the most comprehensive account of each TNC's transportation for the past 11 months. With the trip data, the Commission can learn the number of rides each TNC provides, learn about driving patterns by examining the areas where rides commence and end, learn about the times of the day and days of the week where TNC passenger requests are highest, learn about TNC requests accepted by geographic locations, and total amounts paid for the rides completed.

- The benefits and the public's understanding of government

The Commission's analysis and understanding of TNC trip data will enable the Commission to achieve several important objectives that are in the public interest. First, the trip data will enable the Commission to determine the

safety of TNC operations and if any adjustments in the Commission's regulations should be implemented. As the Commission found in D.13-09-045:

> The Commission opened this proceeding to protect public safety and secondarily encourage innovators to use technology to improve the lives of Californians. The Commission has a responsibility for determining whether and how public safety might be affected by these TNCs. In opening this Rulemaking, the Commission wanted to assess public safety risks, and to ensure that the safety of the public is not compromised in the operation of TNCs.

With trip data as a guide, the Commission can investigate if there are any safety issues concerning the providing of TNC transportation, and if those safety issues are located in particular areas or times of day in which the service is being provided. Unquestionably, the public has an interest in seeing that the Commission satisfies its obligation to ensure that TNC drivers are operating safely.

Second, the trip data can shed light on whether TNCs are offering their service in a nondiscriminatory manner. Transportation is more than a public convenience. As the Comments from the Center for Accessible Technology point out, transportation, and the equal access to same, has become a civil rights priority:

> Transportation equity is a civil and human rights priority. Access to affordable and reliable transportation widens opportunity and is essential to addressing poverty, unemployment, and other equal opportunity goals such as access to good schools and health care services. However, current transportation spending programs do not equally benefit all communities and populations. And the negative effects of some transportation decisions—such as the disruption of low-income neighborhoods—are broadly felt and have long-lasting effects. Providing equal access to

> transportation means providing all individuals living in the United States with an equal opportunity to succeed.[110]

As a result for the need to treat all California residents equally, the Legislature enacted Civil Code § 51(b) to protects all California residents against discrimination:

> (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

The Commission can use the trip data to ensure that all geographic locations, regardless of their economic or racial makeup, are provided with equal access to TNC services. If trip patterns reveal that some geographic locations receive greater access than others, the Commission can use the trip data to investigate those disparities and take the appropriate corrective or enforcement measures, thus assuring the public that the Commission is ensuring that TNCs do not discriminate against any class of persons.

The public interest in ensuring the release of information to validate that industry services regulated by the state are being provided in a nondiscriminatory manner is so strong that it can overcome claims that the information is protected by trade secrets. The California Supreme Court recognized this interest in the context of insurance rates in *State Farm Mutual Automobile Insurance Company v. Garamendi* (2004) 32 Cal.4th 1029, 1047:

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[110] *Center For Accessible Technology's Opening Comments on OIR*, at 3-4, quoting from Leadership Conference on Civil and Human Rights website.

> Finally, the fact that insurers may invoke the trade secret privilege in the public hearing process established by Proposition 103, pursuant to Insurance Code section 1861.08, does not dictate a different result. There is nothing anomalous about precluding insurers from invoking the trade secret privilege after they have already submitted trade secret information to the Commissioner pursuant to a regulation validly enacted under article 10 (*see ante*, at p. 1045), while permitting them to invoke the privilege in response to a request for information in a public rate hearing. Insurance Code section 1861.07 merely requires public disclosure of "information provided to the commissioner pursuant to" article 10. By definition, this information is relevant to the Commissioner's mandate under article 10 to "`ensure that insurance is fair, available, and affordable for all Californians.'" (Historical and Statutory Notes, 42A West's Ann. Ins. Code, *supra*, foll. § 1861.01 at 649.) Given that article 10 seeks to encourage public participation in the rate-setting process (see *ante*, at 1045), precluding insurers from withholding trade secret information already provided to the Commissioner because of its relevance under article 10 (see *ante*, at 1040-1042) is certainly reasonable.

As the public's interest in TNC rides being offered in a nondiscriminatory manner is undoubtably as strong as the public's interest in ensuring that insurance is fair, available, and affordable, making trip data public serves a public interest that should be given great weight in the Commission's calculus.

Third, akin to the public interest in ensuring TNC rides are provided in a nondiscriminatory manner is the public interest that persons with disabilities have equal access to TNC rides. Civil Code § 54.1 specifically prohibits discrimination against persons with disabilities in the provision of services, including transportation services:

> (a)(1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities,

> including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

Similarly, on the federal level, Title II of the Americans with Disabilities Act prohibits disability-based discrimination in providing public and private services.[111] Public and or private entities that provide transportation services to the public are required by law to be accessible to individuals with disabilities. Under the Americans with Disabilities Act (ADA), TNCs are considered private entities primarily engaged in transportation and are required to be accessible to individuals with disabilities.[112]

California recognized the importance of providing TNC service access to persons with disabilities when it amended Pub. Util. Code §5440 as follows:

> (f) There exists a lack of wheelchair accessible vehicles (WAVs) available via TNC online-enabled applications or

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[111] 28 CFR 35.130 General prohibitions against discrimination

- (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

[112] Private entities that are primarily engaged in the business of transporting people and whose operations affect commerce shall not discriminate against any individual on the basis of disability in the full and equal enjoyment of specified transportation services. This obligation includes, with respect to the provision of transportation services, compliance with the requirements of the rules of the Department of Justice concerning eligibility criteria, making reasonable modifications, providing auxiliary aids and services, and removing barriers (28 CFR 36.301-36.306).

> platforms throughout California. In comparison to standard vehicles available via TNC technology applications, WAVs have higher purchase prices, higher operating and maintenance costs higher fuel costs, and higher liability insurance, and require additional time to serve rider who use nonfolding motorized wheelchairs.
>
> (g) It is the intent of the Legislature that California be a national leader in the deployment and adoption of on-demand transportation options for persons with disabilities.

Trip data can provide the initial understanding into whether persons with disabilities are given fair and equal access to TNC rides. In addition to the applicability of ADA protections to TNCs, in September 2018, the Governor signed into state law Senate Bill (SB) 1376: TNC Access for All Act (Hill, 2018). Pursuant to SB 1376, the Commission must establish a program relating to accessibility for persons with disabilities as part of its regulation of TNCs. While implementation of SB 1376 is occurring in Rulemaking 19-02-012, the trip data developed and submitted in this proceeding can assist the Commission develop regulations specific to persons in wheelchairs to help these persons have access to TNC rides.

Fourth, the trip data can help the public understand the impact of TNC vehicles on traffic congestion, infrastructure, and airborne pollutants. With Government Code § 65088, the Legislature made the following findings regarding the need to alleviate traffic congestion and air pollution:

> (a) Although California's economy is critically dependent upon transportation, its current transportation system relies primarily upon a street and highway system designed to accommodate far fewer vehicles than are currently using the system.
>
> (b) California's transportation system is characterized by fragmented planning, both among jurisdictions involved and among the means of available transport.

(c) The lack of an integrated system and the increase in thenumber of vehicles are causing traffic congestion that each day results in 400,000 hours lost in traffic, 200 tons of pollutants released into the air we breathe, and three million one hundred thousand dollars ($3,100,000) added costs to the motoring public.

(d) To keep California moving, all methods and means of transport between major destinations must be coordinated to connect our vital economic and population centers.

(e) In order to develop the California economy to its full potential, it is intended that federal, state, and local agencies join with transit districts, business, private and environmental interests to develop and implement comprehensive strategies needed to develop appropriate responses to transportation needs.

The public has an interest in the Commission sharing trip data with government entities responsible for addressing transportation issues such as congestion, air pollution, and impact on infrastructure. The trip data can show the number of TNC vehicles in service on a given date and time, where the vehicles are concentrated, the overall impact on traffic congestion, impact on road usage, and the impact TNC vehicles have on other service vehicles (*e.g.* public buses, private shuttles, taxis, and vans) that share the same roads.

Thus, when the Commission applies the balancing test to determine the applicability, if any, of the catch-all exemption to Lyft's trip data, the Commission concludes that the public interest in disclosing Lyft's trip data far outweighs the benefits from not disclosing Lyft's trip data.

5. Lyft Failed to Meet its Burden of Proving that the Trip Data in Dispute is Protected from Public Disclosure on Privacy Grounds

Lyft argues that the assigned ALJ committed reversible error in finding that Lyft and Uber failed to establish that trip data was subject to protection

pursuant to Government Code § 6254(c), which precludes the disclosure of "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[113] Lyft acknowledges that the *Ruling* agreed, to a point, and permitted a redaction of driver names, vehicle identification numbers, and latitude and longitude data from the public version of Lyft and Uber's Annual Reports. After removing those categories of information from the public Annual Reports, the *Ruling* found that Uber and Lyft failed to make the "necessary granular showing how the remaining trip data, either individually or in combination, could lead to the identification of a particular driver or customer."[114] Lyft faults the *Ruling* for failing to give it the opportunity to tailor its showing to demonstrate how the balance of the trip data could still constitute an invasion of privacy, and concludes that this failure amounts to a denial of due process.

The Commission rejects Lyft's argument as it confuses and conflates the two concepts of burden of proof and due process. As set forth above, as the party asserting that trip data should be redacted, Lyft bears the burden of proving its claim that unredacted trip data would amount to an invasion of privacy. Knowing that trip data consists of multiple separate categories, it was incumbent on Lyft, in satisfying its burden of proof, to demonstrate how the disclosure of each trip data component would amount to an invasion of privacy. It was not the obligation of the assigned ALJ to devise a number of trip data scenarios for Lyft to address. Instead, as the moving party, and in accordance with our decision in D.20-03-014, Lyft bore the responsibility for presenting all

[113] *Appeal*, at 28.

[114] *Ruling*, at 5.

facts, arguments, and supporting declarations to carry its burden of proof that each trip data category at issue was private. Lyft's failure to do so cannot be transferred to the ALJ.

Nor is Lyft's argument supported by its denial of due process claim. The concept of due process is found in the Fifth[115] and Fourteenth[116] Amendments to the United States Constitution and has been applied in both administrative and judicial adjudicative contexts.[117] The California Constitution has a similar due process clause,[118] And in *Pacific Gas & Electric Company v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, the Court explained how the concept of due process applies to the Commission:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314. Four years later, our Supreme Court ruled on the application of this principle to the PUC: "Due process as to the commission's…action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made." (*People v. Western Air Lines Inc.*, *supra*, 42 Cal.2d 621, 632.) (*51)

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[115] "No person shall be…deprived of life, liberty, or property, without due process of law."

[116] The Fourteenth Amendment prohibits states from "depriving any person of life, liberty, or property, without due process of law."

[117] *Hannah v. Larche* (1960) 363 U.S. 420, 442 ("When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication…it is not necessary that the full panoply of judicial procedures be used.")

[118] California Constitution, art. I, §7(a).

Pacific Gas and Electric Company stated that notice is a fluid concept with no hard and fast rules as to the form the notice must take:

> To begin with, due process does not require any particular form of notice. *(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 990 [4 Cal. Rptr. 2d 837, 824 P.2d 643]; Drummey v. State Bd. of Funeral Directors (1939) 13 Cal.2d 75, 80 [87 P.2d 848]; see Litchfield v. County of Marin (1955) 130 Cal.App.2d 806, 813 [280 P.2d 117*] ["there is no constitutional mandate…which makes specific how … notice is to be given or which form it must take"].) The details can be flexible, "depend[ing] on [the] circumstances … var[ying] with the subject matter and the necessities of the situation." *(Sokol v. Public Utilities Commission (1966) 65 Cal.2d 247, 254 [53 Cal. Rptr. 673, 418 P.2d 265]; see Haas v. County of San Bernardino (2002) 27 Cal.4th 1017, 1037 [119 Cal. Rptr. 2d 341, 45 P.3d 280]* ["The requirements of due process are flexible, especially where administrative procedure is concerned … ."].) All that is required is that the notice be reasonable. *(Jonathan Neil & Assoc., Inc. v. Jones (2004) 33 Cal.4th 917, 936, fn. 7 [16 Cal. Rptr. 3d 849, 94 P.3d 1055]; Drummey v. State Bd. of Funeral Directors, supra, at 80-81.)*
>
> (*52)

The facts here demonstrates that all TNCs were given reasonable notice in accordance with applicable due process standards. D.20-03-014 advised each TNC of what level of proof was expected if a TNC wanted to claim that any part of the 2020 Annual Report should be redacted from public disclosure. D.20-03-014 set forth the necessary showing and Lyft does not claim that it was unaware of its burden of proof.

There is also a second component of due process—the opportunity to be heard, which must be meaningful. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612; *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428-430, footnote 5.) But "there is no precise manner of hearing which must be afforded; rather the particular interests at issue must be considered in determining what kind of

hearing is appropriate. A formal hearing, with full rights of confrontation and cross-examination is not necessarily required." (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565.) Thus, "[d]ue process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." (*In re Love* (1974) 11 Cal.3d 179, 190, footnote 11.)

Lyft was given that meaningful opportunity to be heard when it filed its *Motion.* Lyft attached the Collins Declaration to the *Motion's* memorandum of points and authorities where Lyft presented all its facts and arguments. That the assigned ALJ determined Lyft's showing was legally deficient is not a denial of the opportunity to be heard. Nor is the ALJ required to give Lyft a second opportunity to make an enhanced factual showing to support its *Motion* since whether the assigned ALJ determines that additional evidence is needed is within the discretion of the ALJ.[119] Instead, once Lyft filed its *Motion*, that was the extent of the evidentiary record upon which the ALJ was entitled to rely on and render his ruling unless the ALJ determined more evidence was needed.

Not even the evidence that Lyft alludes to can establish that the assigned ALJ erred in ruling against Lyft's privacy claim related to the trip data at issue. Lyft references the United States Census Bureau documents that are attached to its *Appeal* as Exhibit A and argues that because some census blocks may include as few as five individuals, and 4,000,000 census blocks in the United States have zero population, there are privacy implications from producing trip data census block information.[120] Yet Lyft does not claim that any of its TNC drivers travel from or to census blocks with few two no individuals and that those trips are

[119] Rule 13.11 states that the "Administrative Law Judge or presiding officer, as applicable, *may* require the production of further evidence upon any issue." (Italics added.)

[120] *Appeal*, at 30.

part of the information provided to the Commission in Lyft's 2020 Annual Report.

Lyft next refers to a series of opinions to support its claim that disclosed trip data can lead to an invasion of rider privacy. Lyft first cites a comment from the Director of the Federal Trade Commission's Bureau of Consumer Protection who testified before Congress that any geolocational information can divulge intimately personal details.[121] Then Lyft cites to a paper entitled *The Tradeoff between the Utility and Risk of Location Data and Implications for Public Good* that allegedly found that geolocation data aggregated to the census block level presents "a series risk of de-identification." Finally, Lyft cites to Health Insurance portability and Accountability Act rules that data linked to zip codes with fewer than 20,000 residents, medical data can be re-identified.[122] The Commission declines to consider the testimony, paper, and rules in that they are all inadmissible hearsay. Lyft does not explain why it did not follow the procedure of procuring declarations under oath to support their conclusions, or why declarations were not secured from the authors of the testimony, paper, and Health Insurance Portability and Accountability Act rules and submitted along with Lyft's *Motion*.[123]

Finally, Lyft tries to rely on the report prepared by Privacy Analytics, Inc. (PAI) that Uber submitted as part of its *Motion*.[124] The *Ruling* reviewed PAI's analysis and rejected it as being uncertain, filled with too many qualifiers, and

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[121] *Appeal*, at 31.

[122] *Appeal*, at 33.

[123] The Commission also declines to consider the other studies (an MIT study) and articles (cited in footnotes 129 and 136) that Lyft has cited as they are inadmissible hearsay.

[124] *Appeal*, at 34-36.

was too speculative.[125] Lyft attempts to respond to this criticism, but the Commission rejects Lyft's efforts because Lyft has confused the administrative and evidentiary records. The administrative record consists of all pleadings filed in the docket for an open Commission proceeding. The evidentiary record consists of all evidence that the moving party proffers for the assigned ALJ to rule on the moving party's request. This distinction between the administrative and evidentiary record derives from the definition of "evidence," which according to Evidence Code §140 "means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact[,]" and the "burden of producing evidence," which according to Evidence Code §110 "means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." Reading these Evidence Code sections together means that it is incumbent on the party wishing a ruling in the moving party's favor to present admissible and relevant evidence to the trier of fact.

The PAI report is not part of Lyft's evidentiary record. First, the PAI evidence was submitted with Uber's *Motion*, who has chosen not to appeal the *Ruling*. Thus, Uber's *Motion* and all evidence attached thereto is part of the administrative record in this proceeding but not part of the evidentiary record upon which Lyft relies and presented to the ALJ for consideration. Second, Lyft fails to explain how it has the right to rely on another party's evidence when that party has chosen not to appeal. As only Lyft has filed an *Appeal*, the Commission must limit its review to the evidence Lyft offered as part of its *Motion* as that evidence constitutes the evidentiary record. As the Commission has done so in

[125] *Ruling*, at 7.

evaluating Lyft's *Appeal*, the Commission need not address other evidence that is not part of this *Appeal.*[126]

In reaching that conclusion, the Commission follows the principle that it will not consider evidence that is not part of the evidentiary record. As Lyft and Uber filed separate *Motions*, they had separate records of evidence. Once Uber chose not to appeal, Uber's record did not become part of Lyft's record and is, therefore, not part of Lyft's *Appeal.* (*Protect Our Water v. County of Merced* (2003) 110 Cal.app.4th 362, 364 ["if it's not in the record, it didn't happen."].) Documents not in the record must be ignored. (*Doers v. Golden Gate Bridge, Highway & Transportation District* (1979) 23 Cal.3d 180, 184, footnote 1 ["As a general rule, documents not before the trial court cannot be included as a part of the record on appeal. (6 Witkin, *Cal. Procedure* (2d ed. 1971) Appeal, § 218, pp. 4208-4209.) Similarly, facts that aren't in the record but are asserted in a brief

[126] Even if Lyft had asked the Commission to take official notice of the PAI report pursuant to Rule 13.10, such an effort would not have advanced Lyft's cause. If the Commission had taken official notice of the PAI report it would not have taken official notice of the findings and conclusions as to whether trip data can be engineered to (1) reveal a passenger's identity; (2) reveal the starting and ending addresses of a TNC trip; and (3) reveal a driver's identity, because these findings and conclusions are reasonably subject to dispute and, therefore, may not necessarily be correct. (*See Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 241 ["judicial notice of a document does not extend to the truthfulness of its contents or the interpretation of statements contained therein, if those matters are reasonably disputable."] Numerous other decisions are in accord with this limitation on the use of judicial notice. (*See Richtek USA, Inc. v. UPI Semiconductor* (2015) 242 Cal.App.4th 651, 660-662 [facts in pleadings]; *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 148 [findings of fact in prior judicial opinion]; *Lockley v. Law Office of Cantrell, Green Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [hearsay statements in decisions and court files]; and *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565 and 1568 [truth of judge's factual finding.) This reluctance also extends to not taking official notice of the truth of allegations in affidavits, declarations, and reports. (*See Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [affidavits]; Tarr v. Merco Construction Engineers, Inc. (1978) 84 Cal.App.3d 707, 715 [affidavits, pleadings, and allegations]; and *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 878-879 [arrest report].)

must be disregarded. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

6. Conclusion

The Commission finds that the *Ruling* correctly determined that Lyft failed to meet its burden of proving that the trip data at issue is protected from public disclosure on trade secret grounds.

The Commission finds that the *Ruling* correctly determined that Lyft failed to meet its burden of proving that the trip data at issue is protected from public disclosure on privacy grounds.

The Commission finds that the ALJ acted within his discretion when, after finding that Lyft did not meet its burden of proving that the trip data at issue did not satisfy the novel or uniqueness standard, it was not necessary for him to consider the other elements of a trade secret claim because the elements are written in the conjunctive rather than the disjunctive.

The Commission finds that the ALJ correctly applied the trade secret and privacy laws in reaching his conclusions in the *Ruling*.

The Commission finds that the *Ruling* is supported by the factual and legal findings contained therein.

The Commission finds that considering the evidentiary record, there is substantial evidence to support the *Ruling's* finding that the trip data at issue is not protected from public disclosure on privacy grounds.

The Commission finds that considering the evidentiary record, there is substantial evidence to support the *Ruling's* finding that the trip data at issue is not protected from public disclosure on trade secret grounds.

The Commission finds that the ALJ did not abuse his discretion in applying the facts to the law in his *Ruling*.

The Commission finds that the *Ruling's* findings do not result in a violation of a constitutionally protected right as the trip data at issue is not protected from disclosure on privacy grounds.

7. Comments on Proposed Decision

The proposed decision of Commissioner Genevieve Shiroma in this matter was mailed to the parties in accordance with Section 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, 2021 by _____. Reply comments were filed on _____, 2021 by _____.

8. Assignment of Proceeding

Genevieve Shiroma is the assigned Commissioner and Robert M. Mason III and Debbie Chiv are the assigned Administrative Law Judges in this proceeding.

Findings of Fact

1. In D.13-09-045, the Commission required all TNCs to submit Annual Reports that include trip data.
2. Commission staff has supplemented the trip data requirements in D.13-09-045 and D.16-041 with data requests and reminder letters that advised the TNCs as to the additional data fields that needed to be completed for the Annual Reports.
3. Commission staff has provided TNCs with a template and data dictionary for use in completing their Annual Reports.
4. Lyft's Motion contained one supporting declaration from Brett Collins.
5. Brett Collins is not the author of the various studies, articles, and reports that Lyft referenced in its Motion and in its Appeal.
6. In its Motion, Lyft offered no facts to support the claim that Lyft drivers are required to keep trip data that they learn of confidential.

7. In its Motion, Lyft offered no facts to support the claim that Lyft passengers are required to keep trip data that they learn of confidential.

Conclusions of Law

1. It is reasonable to conclude that the *Ruling* correctly determined that Lyft failed to carry its burden of proving that the trip data at issue is exempt from public disclosure by the trade secret protection.

2. It is reasonable to conclude that the *Ruling* correctly determined that Lyft failed to carry its burden of proving that the trip data at issue is exempt from public disclosure by California's privacy laws set forth in Article I, Section 1, of the California Constitution.

3. It is reasonable to conclude that the trip data at issue does not meet the definition of a trade secret provided by Civil Code §§ 3426 through 3426.11.

4. It is reasonable to conclude that the trip data at issue does not fit within any of the protected categories in California's privacy law provided by Government Code § 6254(c).

5. It is reasonable to conclude that the assigned ALJ acted within his discretion when, after finding that Lyft did not meet its burden of proving that the trip data at issue did not satisfy the novel or uniqueness standard of *Morlife* and *OTR Wheel Engineering*, it was not necessary for him to consider the other elements of a trade secret claim because the elements are written in the conjunctive rather than the disjunctive.

6. It is reasonable to conclude that the ALJ correctly applied the trade secret and privacy laws in reaching the conclusions in the *Ruling*.

7. It is reasonable to conclude that the *Ruling* is supported by the factual and legal findings contained therein.

8. It is reasonable to conclude that Lyft drivers are not required to keep trip data that they learn of confidential.

9. It is reasonable to conclude that Lyft passengers are not required to keep trip data that they learn of confidential.

10. It is reasonable to conclude that disclosing the trip data at issue will allow the public to see if the TNCs are operating safely.

11. It is reasonable to conclude that disclosing the trip data at issue will allow the public to see if the TNCs are operating in a nondiscriminatory manner.

12. It is reasonable to conclude that disclosing the trip data at issue will allow the public to see if persons with disabilities have equal access to TNC services.

13. It is reasonable to conclude that disclosing the trip data at issue will allow the public to see the impact of TNC vehicles on traffic congestion, infrastructure, and airborne pollutants.

14. It is reasonable to conclude that considering the evidentiary record, there is substantial evidence to support the *Ruling's* finding that the trip data at issue is not protected from public disclosure on privacy grounds.

15. It is reasonable to conclude that considering the evidentiary record, there is substantial evidence to support the *Ruling's* finding that the trip data at issue is not protected from public disclosure on trade secret grounds.

16. It is reasonable to conclude that the ALJ did not abuse his discretion in applying the facts to the law in the *Ruling*.

17. It is reasonable to conclude that the *Ruling's* findings do not result in a violation of a constitutionally protected rights as the trip data at issue is not protected from disclosure by California's privacy laws.

18. It is reasonable to conclude that requiring Lyft to disclose the trip data at issue does not amount to an unreasonable search and seizure under the Fourth Amendment to the U.S. Constitution.

19. It is reasonable to conclude that requiring Lyft to disclose the trip data at issues does not amount to a regulatory taking under the Fifth Amendment to the U.S. Constitution.

20. It is reasonable to conclude that the public interest in not disclosing the trip data at issue does not clearly outweigh the public interest in disclosing the trip data at issue.

21. It is reasonable to conclude that the public interest in disclosing the trip data at issue clearly outweighs the public interest in not disclosing the trip data at issue.

O R D E R

IT IS ORDERED that:

1. The Appeal of Lyft, Inc. (Lyft) of the assigned Administrative Law Judge's *Ruling on Uber Technologies, Inc.'s and Lyft's Motion for Confidential Treatment of Certain Information in Their 2020 Annual Reports* is denied.

2. Lyft, Inc. shall comply with the Administrative Law Judge's *Ruling on Uber Technologies, Inc.'s and Lyft's Motion for Confidential Treatment of Certain Information in Their 2020 Annual Reports* no later than 30 days after this decision is issued.

3. The following categories of trip data shall be disclosed, for each ride provided, as part of each Transportation Network Company's public version of its Annual Report from 2020 and onward:

- Census Block of Passenger Drop Off,
- Trip Requester Zip Code,
- Trip Requester Census Block,

- Driver Zip Code,
- Driver Census Block,
- Trip Request Date/Time (to the second),
- Miles Traveled (P1),
- Request Accepted Date/Time (to the second),
- Request Accepted Zip Code,
- Request Accepted Census Block,
- Passenger Pick Date/Time (to the second),
- Miles Traveled (P2),
- Passenger Pick Up Zip Code,
- Passenger Pick Up Census Block,
- Passenger Drop Off Date/Time (to the second),
- Passenger Drop Off Zip Code,
- Passenger Drop Off Census Block,
- Miles Traveled (P3), and
- Total Amount Paid.

4. Rulemaking 12-12-011 remains open.

This order is effective today.

Dated _____, at San Francisco, California.